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EXPLANATION OF TERMS

Ben Avon Borough Case	—Ohio Valley Water Co. vs. B Avon Borough, 253 U.S. 2 64 L. Ed. 908.
City	—Appellees, City of Laredo a its governing body.
Commission	—Appellees, Railroad Commissi of Texas.
Company	—Appellant, United Gas Pub Service Company, and its pre cessors in title, Border C Company, Texas Border C Company, and South Texas C Company.
Court of Civil Appeals	—The Court of Civil Appeals the Third Supreme Judic District of Texas, at Austin.
District Court	—The State trial court—53rd J dicial District Court of Tra County, Texas, sitting at Aust
Dayton Case	—Dayton P. & L. Co. vs. Pu Ut. Com. of Ohio, 292 U. 290, 78 L. Ed. 1267.
Lindheimer Case	—Lindheimer vs. Ill. Bell. T Co., 292 U. S. 151, 78 L. E 1182.
Los Angeles Case	—Los Angeles G. & E. Corp. R. R. Com. of Cal., 289 U 287, 77 L. Ed. 1180.
St. Joseph Case	—St. Joseph Stock Yards Co. United States, 298 U. S. 3 80 L. Ed. 1033.
MCF	—Thousand cubic feet of natu gas.
R.	—Record. — (Note: Rom Numeral following "R."— example, R.I.—indicates R ord, Vol. I. Similarly, R.I, 4 for example, indicates Reco Vol. I, page 40.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1937

NO. 13

UNITED GAS PUBLIC SERVICE COMPANY,
Appellant

Versus

THE STATE OF TEXAS, ET AL,
Appellees

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

BRIEF AND ARGUMENT FOR APPELLEES

PRELIMINARY STATEMENT.

To our minds the record, as printed, is very awkwardly arranged, and doubtless will cause this Court some inconvenience and confusion, as it has to counsel for the City and Commission. The arrangement of the matter in the printed record is not due to any fault on the part of the Clerk of this Court; or, we believe, to any fault of our own; but is due solely to the procedure adopted by the Company in designating, arranging and printing the record for presentation to this Court. That method we will now attempt briefly to outline, in order that the Court may understand

why the unusual arrangement and duplications in the record necessarily resulted from the Company's procedure.

The record in the Court of Civil Appeals and the Supreme Court of Texas was typewritten, the oral testimony was in question-and-answer form and included all colloquy, objections, arguments, etc., transpiring in the trial before the District Court, and was a great deal more voluminous than the printed record in this Court.

It has been, and is, our understanding that the proper procedure to be followed in designating matters to be included in the transcript sent up to this Court is that the Appellant should first designate the desired portions, and that the Clerk of the Court of Civil Appeals should then await Appellee's counter-designation of additional parts before transcribing any part of the record; and that when both such designations are received, he should then, by parallel references to both such designations, compile all matters called for therein in exactly the same order that the various excerpts appear in the original record. This would insure that the matter in the printed record here would appear in the same sequence, with completeness and with the same context as in the original record.

That course was not pursued in this case, however; on the contrary, the Company, simultaneously with the filing of its designation of parts to be included in the transcript, accompanied such designation with a transcript, made up by its own stenographers, of only the excerpts requested by the Company, without

awaiting Appellees' counter-designation. The Clerk of the Court of Civil Appeals had no adequate clerical or stenographic force for making within the required time a transcript of the large volume of matter included in the praecipes. This became a certainty upon the filing of Appellees' counter-designation of portions to be included in the transcript.

Accordingly, at the Company's request, the parties entered into a stipulation (R.I. 533, et seq) agreeing that in lieu of a transcript the entire original record, together with that portion of the transcript already prepared by the Company of the excerpts requested by it (the latter embracing in addition to numerous short excerpts from the oral testimony and exhibits before the Commission and the District Court, a transcript of the various orders and other proceedings in the Court of Civil Appeals and the Supreme Court of Texas, the originals of which could not go up) might go up as the record in this cause. It will be observed that the portions designated by the Company appear in R.I. 1-536, inclusive, and consist of exhibits and very incomplete excerpts from oral testimony, carefully hand-picked by the Company in such way as to present in the printed record only the matters most favorable to it. These excerpts, being incomplete, severed from their context, and appearing out of their original sequence, are very misleading. It has been the Company's attitude from the beginning that such portions so selected by it, and those alone, should constitute the record on which this Court should dispose of the case.

The Commission and the City have disagreed, and do disagree, with that theory vehemently. It is our

idea that since confiscation is essentially the sole question involved in this appeal, and since practically all of the evidence below bore upon that ultimate question, it was necessary for practically the entire record to be before this Court. Accordingly, in Appellees' counter-designation we have asked for the additional matters which now appear in the record from R.I, 536, to the end of R.II, 1415.

In agreeing that the original record might be accompanied by the partial transcript already prepared by the Company, it was anticipated by us that in making up its printing praecipe the Company would designate the portions desired to be printed, by appropriate volume and page references to the *original* record; and that the partial transcript made up by the Company, and accompanying the record, would be used only for designating for printing the *transcript* of such orders and other proceedings in the Court of Civil Appeals and the Supreme Court of Texas as should be necessary.

Contrary to our expectations, however, the Company in its printing praecipe simply requested the Clerk of this Court to print (R.II, 1407, 1410-1411) "all of the typewritten transcript of record certified by the Clerk of the Court of Civil Appeals pursuant to Appellant's praecipe," etc., and "Appellant designates the remainder of said typewritten transcript, after excluding those parts set out above, for printing." The Company's printing praecipe did not designate by book and page reference from the original record at all, but merely referred to the partial transcript.

It immediately became apparent, therefore, and was pointed out to us by the Clerk of this Court, that such manner of designation for printing by the Company, in the peculiar manner in which this record came up, would make it necessary to segregate, and to print separately in the first portion of the record, only those excerpts called for by the Company, and to print in the subsequent portion of the record those additional parts designated by the City and Commission. It became apparent, also, that this method of printing would seriously distort the record, segregate the Company's requested excerpts from their context, and make the same largely meaningless or misleading; and would also involve numerous duplications, to make the context clear and the sense complete.

After conference with the Clerk of this Court, we conferred at length with counsel for the Company in an attempt to work out a plan whereby these difficulties and distortions could be remedied and the various portions designated for printing by both parties could be arranged without duplication and in the same order and context, as presented in the original record. Counsel for the Company, however, were obdurate and insisted upon having the record printed in the manner in which it now appears. An examination of the record will disclose that to have submitted the case only upon those portions requested by the Company (R.I, 1-536) would not have been a fair presentation of the case to this Court; and in order to obviate this injustice and risk it was necessary for the City and Commission to duplicate in their requested portions some parts requested by the Company, in order to make the context conveniently clear and the sequence orderly.

We call the Court's further attention to the fact that, in our counter-designation of parts to be included in the transcript (R.I,520) we requested the Clerk to omit all unnecessary matter, including all objections to testimony, all comments and arguments on such objections, all rulings thereon, and all the exceptions taken to such rulings, all repetitions of questions and answers, and all other obviously unnecessary matters. Indeed, it was our understanding that this Court's Rule 13, sub-section 9, reading, "He shall, however, omit all duplication or repetition of titles and all other obviously unimportant matter", required the elimination of such matters in printing, without such a specific request from the parties. Since the Court's above-quoted rule has not worked out that way, however, there is some unanticipated matter included in the portions requested by us to be printed.

STATEMENT OF THE NATURE AND RESULT OF THE SUIT

In the month of February, 1909, the City of Laredo granted a 25-year franchise to a group of individuals for the construction and operation of a natural gas distribution system in the said City; this franchise and all rights thereunder were acquired in the year 1910 by a corporation organized at that time and known as the Border Gas Company, which company constructed the necessary transmission and distribution properties and began rendering service to consumers in the City shortly before the end of 1910 (R.I,210, 621-622).

From 1910 to April 10, 1928, Border Gas Company owned and operated the producing gas wells, the transmission lines, and the distribution system supplying natural gas to consumers in Laredo (R.I, 225-227; R.II, 751, 784); on April 10, 1928, that portion of the Company's properties comprising the distribution system, serving Laredo and other communities,[1] was acquired by a newly organized corporation, styled Texas Border Gas Company; and at the same time all gathering lines and equipment and transmission lines were acquired by a newly organized corporation, styled South Texas Gas Company, and the producing gas wells and other production properties were acquired by a newly organized corporation, styled South Texas Production Company (R.I,544-545; R.II, 748, 751, 784). Control, through stock ownership, of the said three corporations was in Appellant here, United Gas Public Service Company, which Company is a unit of United Gas Corporation, which latter corporation is, in turn, an affiliate and under the management of Electric Bond & Share Company of New York (R.I, 11-12, 645-646, 691-695; R.II, 784, 885, 1315, 1334-1335): From the date of the aforesaid dissolution of the original Border Gas Company, April 10, 1928, and the division of its activities into several affiliates, all natural gas distributed in Laredo was purchased by the distributing company, Texas Border Gas Company, from an af-

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[1] The communities, in addition to Laredo, in which the Company owned and operated distribution systems in the Laredo area, are as follows (R.II,766): Hebbronville, Mirando City, Bruni, Aguilares, Roma, Oilton.

filiated transmission company, South Texas Gas Company,[2] which latter company in turn purchased its requirements of natural gas from another affiliate, South Texas Production Company (R.II, 1130-1134). This arrangement continued until October 21, 1932[3], at which time Texas Border Gas Company and South Texas Gas Company were dissolved and their properties transferred to United Gas Public Service Company, (R. I, 588, 731-732), which latter Company thereafter purchased or produced, transported and distributed natural gas to consumers in the City

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[2]The gate rate contract under which South Texas Gas Company sold to its affiliate, Texas Border Gas Company, all gas distributed in Laredo and the surrounding territory was entered into April 10, 1928, and provided for the following scale of rates:

30c per MCF for all gas sold to domestic consumers;
14c per MCF for all gas sold to industrial consumers.

The aforesaid gate rate prices are not directly involved in this proceeding, as the properties of the Company used, useful, and necessary in serving Laredo were valued as a complete operating unit. (R. I, 12).

[3]On February 28, 1931, at the inception of this rate controversy, the Company, in response to the City's request, supplied a map purporting to show the transmission property claimed to be used and useful in the service of Laredo as of that time. (R.I,216-A, map; R.II, 1280-1282). Compare this map with the map of the properties claimed to be used, useful and necessary in the Laredo service, made up by the Company in December, 1931, (R.II, 1405). For the Court's convenience we have appended, as the last page of this brief, a replica of this last mentioned map.

and the surrounding area (R. I, 103-104, 588). No competing gas system has ever operated or supplied gas to consumers in Laredo, (R. I, 702-703).

Up to 1921, the Company served domestic gas to consumers in Laredo at 50 cents per MCF, (R. I, 628). In that year, on the Company's representations that the gas supply was being "rapidly exhausted", it procured the City's acquiescence, without ordinance but by sufferance, to raise the rate to 75 cents gross (67½c net), with $1.00 per month minimum bill, upon its promise that "if the gas supply should increase, that the rate would be again reduced to a reasonable amount." (R. I, 7-8). Although by December 15, 1931, as recited in the preamble to the City's rate reduction ordinance of that date, the gas supply had "sufficiently increased and is now such as to demand that such agreement be complied with", (R. I, 7-8), the Company refused to reduce the increased rate, and continued to charge same until the present time. (R. I, 32, 64, 539, 583). This has been the Company's attitude, despite the fact that as early as 1922 the Carolina-Texas field, approximately 13 miles northeast of the original Reiser field, and only 37 pipe line miles from Laredo, (See map R. II, 1405, or Appendix to this brief), was discovered with a supply which, even as of the time of the trial in 1934, after nearly ten years of withdrawals, was still sufficient to supply the entire needs of the City and other surrounding communities; and despite also the later discovery of other numerous and almost inexhaustible sources of supply, such as the Cole-Bruni fields only a few miles east of Carolina-Texas. In fact, the record shows

without doubt that the nearby available reserves are and have been almost unbelievably large. See the Company's own statement as to its reserves in the immediate area, as of March 6, 1928, in a circular then distributed by it, and upon the strength of which it sold bonds and securities. (R. I, 696, 715-717). See also R. I, 654, showing the open flow capacity of the wells in some of these fields.

This cause had its inception in the passage of an ordinance by the City on December 15, 1931, reducing the then prevailing domestic rate of 75 cents (net 67½c) per MCF for natural gas to 40c per MCF; the ordinance, by its terms, was to become effective January 1, 1932, (R. I, 9). On December 23, 1931, the Company filed its appeal with the Commission and posted its bond in accordance with the provisions of Article 6058, R.C.S. Texas (1925), which said appeal is No. 49 on Gas Utilities Docket of the Commission, (R. I, 59).

Subsequently, on June 29, 1932, the Company filed with the City an application for an increase in rate to $1.50 per MCF to domestic consumers.[4] Upon receipt of said application the City requested the Company to submit facts and figures setting forth its requirements necessitating such increase. Failing to receive such information, the City took no action on the application (R. II, 1353-1355).

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[4]The Company's proposed rate schedule appears in R. II, 1352-A.

Pursuant to the provisions of said Article 6058, R.C.S. Texas (1925)[5], the Company perfected its appeal, which appeal is No. 63 on the Gas Utilities Docket of the Commission.

The two appeals were consolidated and hearings were held thereon before the Commission in October and November, 1932 (R. I, 9, 11).

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[5]"Art. 6058. Appeal from city control. When a city government has ordered any existing rate reduced, the gas utility affected by such order may appeal to the Commission by filing with it on such terms and conditions as the Commission may direct, a petition and bond to review the decision, regulation, ordinance, or order of the city, town or municipality. Upon such appeal being taken the Commission shall set a hearing and may make such order or decision in regard to the matter involved therein as it may deem just and reasonable. The Commission shall hear such appeal de novo. Whenever any local distributing company or concern, whose rates have been fixed by any municipal government, desires a change of any of its rates, rentals or charges, it shall make its application to the municipal government where such utility is located and such municipal government shall determine said application within sixty days after presentation unless the determination thereof may be longer deferred by agreement. If the municipal government should reject such application or fail or refuse to act on it within said sixty days, then the utility may appeal to the Commission as herein provided. But said Commission shall determine the matters involved in any such appeal within sixty days after the filing by such utility of such appeal with said Commission or such further time as such utility shall in writing agree to, but the rates fixed by such municipal government shall remain in full force and effect until ordered changed by the Commission."

On June 13, 1933, the Commission entered its order (R. I, 25-26) fixing the rate for natural gas to domestic consumers in the City at 55c per MCF, effective as of January 1, 1932 (the effective date of the ordinance and eight days after the Commission acquired jurisdiction of the parties and of the subject-matter herein), and ordering refunds of the difference between the prescribed rate and the amounts collected by the Company from January 1, 1932. The Commission's opinion and findings appear in R. I, 9-25.

On June 29, 1933, the Company filed its petition in the United States District Court for the Southern District of Texas to enjoin the enforcement of the order. A temporary restraining order was issued by the District Judge, and a three-judge court was assembled to hear the application for an interlocutory injunction (R. I, 33).

On July 26, 1933, this cause was instituted by the Commission and City in the State District Court at Austin (R. I, 1), and an application filed with the three-judge court under Section 380, Title 28, U.S.C.A., (Sec. 266, Judicial Code, as amended) for a stay of proceedings in the Federal Court, pending the trial and disposition of the case in the State Courts. On August 1, 1933, the three-judge court entered its order staying all proceedings in the Federal Court, pending the disposition of the case in the State Courts, but retaining jurisdiction of the subject-matter pending the final determination of the cause (R. I, 28-30). Immediately, upon entry of said order by the three-judge court, the Company filed its petition in the United States District Court for the Western District

of Texas seeking a removal of the cause from the State to the Federal Courts for trial; and upon hearing had on the said petition, the District Judge entered his order remanding the case to the State District Court at Austin for trial and future proceedings therein (R. II, 1109).

A trial was had in the State District Court, under the provisions of Article 6059, R.C.S. Texas (1925)[6], resulting in a judgment sustaining the 55c

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[6]Art. 6059, R.C.S. Texas (1925): "Appeal from orders. If any gas utility or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the Commission, such dissatisfied utility or party may file a petition setting forth the particular cause of objection thereto in a court of competent jurisdiction in Travis County against the Commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature and shall be tried and determined as other civil causes in said court. Either party to said action may have the right of appeal; and said appeal shall be at once returnable to the appellate court, and said action so appealed shall have precedence in said appellate court of all causes of a different character therein pending. If the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days notice. In all trials under this article the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to it or them."

See R. I, 413, for the Court of Civil Appeals' construction of Art. 6059 as permitting the Commission to institute the suit in the nature of an appeal in these circumstances, so as to transfer the litigation to the State District Court pursuant to Title 28, Sec. 380, U.S.C.A. (Sec 266, Judicial Code, as amended).

rate in all respects, excepting the provision as to refunds accruing to rate-payers from January 1, 1932, the effective date of the order (R. I, 389).

On appeal by the Company to the Court of Civil Appeals, a decision was rendered by that Court on October 30, 1935, upholding the order of the Commission *in toto*, including the refund provision which the District Court had stricken down (R. I, 410-429).[7]

The Company thereupon filed with the Supreme Court of Texas its application for writ of error, which application, after having been before the said Court for its consideration for nine months (R. I, 458) was by it in all things refused on October 7, 1936, (R. I, 474), and the Company's motion for rehearing thereof was overruled on December 30, 1936 (R. I, 479).

The Company contends that its efforts to obtain appellate judicial review of the case in both the Court of Civil Appeals and the Supreme Court of Texas have been fruitless. As will appear more fully below, the Company has obtained thorough-going appellate judicial review of its case both in the Court of Civil Appeals and in the Supreme Court of Texas. Under the established statutory practice in Texas, the refusal of the application for writ of error by the Supreme Court of Texas (as distinguished from a *"dismissal for want of jurisdiction"*) constitutes and necessarily involves a thorough consideration of the entire case

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[7]United Gas Public Service Co. vs. State of Texas et al, 89 S. W. (2d) 1094, writ refused.

on its merits, and is an affirmance of the judgment of the Court of Civil Appeals, without opinion. *Gammel Statesman Pub. Co. vs. Ben C. Jones & Co.*, 206 S. W. 931; (not officially reported, Supreme Court of Texas). Art. 1728, R.C.S. Texas (1925), as amended (Acts 1927, 40th Leg., p. 214, ch. 144, Sec. 1); fixing jurisdiction of, and prescribing procedure to be followed by, the Supreme Court of Texas in acting upon applications for writs of error.[8]

The Company's Petition for Appeal to this Honorable Court was thereupon presented to and allowed by Mr. Justice Benjamin N. Cardozo, January 20, 1937 (R. I, 513-514).

SUMMARY OF ARGUMENT

GENERAL THESIS: THE COMPANY'S EVIDENCE WAS INSUFFICIENT, BOTH AS A MATTER OF LAW AND A MATTER OF FACT, TO DEMONSTRATE CONFISCATION AND TO OVERTURN THE PRESUMED VALIDITY OF THE ORDER. THE COURT OF CIVIL APPEALS, THEREFORE, MADE A CORRECT DISPOSITION OF THE CASE IN ANY EVENT.

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[8] "Art. 1728 * * * In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; in all cases where the judgment of the Court of Civil Appeals is a correct one but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction."

THIS BECOMES MORE CLEARLY APPARENT WHEN THE COMPANY'S EVIDENCE IS CONSIDERED IN CONNECTION WITH, AND CHECKED BY, THE COMMISSION'S EVIDENCE SHOWING THAT THE 55c RATE IS COMPENSATORY.

I. There is, and can be, no claim of denial of due process through lack of due notice, hearing, or opportunity to be heard, the Company having plead (R. I, 33) that the order was entered after "a hearing was held with respect thereto in October and November, 1932, and full testimony was given with respect to" the entire matter.

II. The order is presumed *prima facie* to be non-confiscatory:

St. Joseph Stock Yards Co. vs. United States, 298 U. S. 38, 52, 53, 54, 60, 64, 67; 80 L. Ed. 1033;
Lindheimer vs. Ill. Bell Tel. Co., 292 U. S. 151, 164, 169, 175; 78 L. Ed. 1182;
Los Angeles G. & E. Corp. vs. R. R. Com. of Cal., 289 U. S. 287, 304, 305, 307; 77 L. Ed. 1180;
Dayton P. & L. Co. vs. Pub. Ut. Com. of Ohio, 292 U. S. 290, 298; 78 L. Ed. 1267;
Darnell vs. Edwards, 244 U. S. 564, 569; 61 L. Ed. 1317;
Willcox vs. Consolidated Gas Co., 212 U. S. 19, 41; 53 L. Ed. 382;
United Fuel Gas Co. vs. R. R. Com. of Kentucky, 278 U. S. 300, 313; 73 L. Ed. 390.

III. Orders of the Commission have the same force and effect as ordinary statutes of the State; and are,

therefore, entitled to the exceedingly strong presumption of validity that is accorded to statutes in determining the constitutionality thereof:

Pacific States Box & Basket Co. vs. White, 296 U. S. 176, 185-186; 80 L. Ed. 138;
West Texas Compress Co. vs. P. & S. F. Ry. Co., 15 S.W. (2) 558, 560;
R. R. Com. of Texas vs. Uvalde Construction Co., 49 S.W. (2) 1113, 1114.

IV. The burden is upon the complaining party to prove confiscation or deprivation of other constitutional rights by evidence so clear and satisfactory as to leave no reasonable doubt in the judicial minds of the reviewing courts:

Cases cited under Point II above; and
Art. 6059 R. C. S. Tex. (1925).[9]
San Diego Land & Town Co. vs. National City, 174 U. S. 739, 754; 43 L. Ed. 1154;
Knoxville vs. Knoxville Water Co., 212 U. S. 1, 16; 53 L. Ed. 371;
C. M. & S. P. R. Co. vs. Thompkins, 176 U. S. 167, 173; 44 L. Ed. 417;
G. C. & S. F. Ry. Co. vs. R. R. Com. of Texas, 102 Tex. 338, 352; 113 S.W. 741, 747;
R. R. Com. of Tex. vs. Weld & Neville, 96 Tex. 394, 409; 73 S.W. 529;
R. R. Com. of Tex. vs. Galveston Chamber of Commerce, 105 Tex. 101, 115; 145 S.W. 573;

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[9]"In all trials under this article the burden of proof shall rest upon the plaintiff, who must show by CLEAR AND SATISFACTORY evidence that the rates . . . complained of are unreasonable and unjust to it or them."

R. R. Com. of Tex. vs. Shupee, 57 S.W. (2) 295, 301, affirmed 123 Tex. 521, 528, 73 S. W. (2) 505, 508;
Brown vs. Humble Oil & Ref. Co., 126 Tex. 296, 87 S. W. (2) 1069, 1070.

V. The foregoing rule (Point IV, above) does not place upon the Company, as it will contend, an impossible burden in the sense that the order will be upheld if there is any evidence countervailing against the Company's. It does mean that the Court of Civil Appeals, and the Supreme Court of Texas, properly did what this Court has many times done; (See cases cited under Points II, IV and XXII), namely, analyzed all of the Company's evidence and determined as a preliminary question of law that the same lacks the quality of being sufficiently clear and satisfactory to outweigh the presumed validity of the order. The law itself, which places upon one complaining of the Commission's order the extraordinarily heavy burden of proving it confiscatory by clear and satisfactory evidence, stands always at the threshhold of a rate case as a continuing challenge of the legal sufficiency of the complaining party's evidence. If the evidence does not measure up to the required standard of clarity and satisfactoriness, in the opinion of the reviewing court sitting in chancery (this being an equity case), then the complaining party has, as a matter of law, failed to discharge the burden of overturning the presumed validity of the order. The complaining party proceeds at his own peril as to meeting this burden. Any other rule would make the courts, and not the Commission, the ultimate legislative rate-makers.

VI. In this view, the District Court, the Court of Civil Appeals and the Supreme Court of Texas, have retained and exercised their right of independent judgment as to the facts, as well as the law of the case, prescribed as constitutionally requisite by the decisions of this Court in the *Ben Avon Borough and St. Joseph cases;* and had it been determined, as a matter of law, that the Company's evidence was sufficiently clear and satisfactory to present fact issues and to overturn the presumed validity of the order, then the Court of Civil Appeals or the Supreme Court of Texas would have remanded the cause to the District Court for fact findings:

> Railroad Com. of Texas vs. Shupee, 57 S.W. (2d) 295, 301[10], affirmed 123 Tex. 521, 528, 73 S.W. (2d) 505, 508.

VII. If it is not a denial of due process under the Fifth Amendment to the Federal Constitution for this

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[10]The Court said, at page 301: "The manifest difference in these statutes is only as to the quantum of proof necessary on the respective appeals, and does not affect the principle on which the Court acts in determining whether the order is unreasonable and unjust as to complainant, which rule is the same in each appeal. That is, each of these appeal statutes is construed with reference to the particular statutes to which each relates, and merely requires that the court must first judicially determine whether the complainant has introduced evidence of such probative force or value, or such character or quantum, as will satisfy the statutory burden placed by each statute upon the complainant; and when the Court has judicially determined such matter favorably to complainant, then to proceed with the trial of any fact issue as in ordinary trials on a preponderance of the evidence."

Court to dispose of cases of alleged confiscation by the method, outlined in Point V above, of weighing and passing upon the legal sufficiency of the evidence to overturn the presumed validity of the order (See cases cited under Points II, IV, and XXII), then it cannot be a denial of due process under the Fourteenth Amendment for the state courts to pursue the same method, as the Court of Civil Appeals and the Supreme Court of Texas have done in this case.

VIII. In the absence of some constitutional, statutory, or court rule provision requiring findings of fact by the regulatory commission, or by the reviewing courts (there being no such provision applicable here), such findings are not essential to the validity of the Commission's order or to the regularity of a judicial review thereof; and they are not in any event essential to due process under the Fifth and Fourteenth Amendments to the Federal Constitution. This Court's Equity Rule No. 70½ requires such findings to be made by inferior federal courts, but not by state courts:

Pacific States Box & Basket Co. vs. White, 296 U. S. 176, 186; 80 L. Ed. 138;
United Fuel Gas Co. vs. R. R. Comm. of Ky., 278 U. S. 300, 309-310; 73 L. Ed. 390;
Tex. Motor Coaches vs. R. R. Comm. of Tex., 59 S.W. (2) 923, 926, affirmed 123 Tex. 517, 73 S. W. (2) 511.

IX. Even if it should be determined (as we think it should not) that there is a denial of due process to the Company under the Fourteenth Amendment, abstractly, in any failure of the Commission to make

findings upon ultimate or subsidiary facts; or in the failure, if there was a failure, of the state courts to make complete findings of fact; yet this assumed abstract unconstitutionality would not of itself be sufficient to entitle the Company to an injunction against enforcement of the order. It would be necessary for the Company to go farther and prove actual and substantive injury through confiscation by the rate actually fixed by the Commission, which has not been done:

United Fuel Gas Co. vs. R. R. Com. of Ky., 278 U. S. 300, 309-310; 73 L. Ed. 390;
Premier-Pabst Sales Co. vs. Grosscup, 298 U. S. 226, 227; 80 L. Ed. 1155;
State Corp. Com. vs. Wichita Gas Co., 290 U. S. 561, 568-569; 78 L. Ed. 500, 504;
Terrace vs. Thompson, 263 U. S. 197, 214; 68 L. Ed. 255, 274;
Great Northern Ry. Co. vs. Washington, ... U. S. .....; 81 L. Ed. ..... (dissenting opinion) (Adv. Op. No. 7, p. 359); (No. 20, October Term, 1936);
West vs. Chesapeake & Potomac Tel. Co., 295 U. S. 662, 681; 79 L. Ed. 1640, 1652 (dissenting opinion).

X. To uphold the order, it was not (as the Company will contend) necessary to, and the Court of Civil Appeals and the Supreme Court of Texas did not, close their eyes and minds to the evidence submitted by the Company, or fail or refuse to consider and analyze same thoroughly and accord to it all of the weight to which it was entitled; nor did they base their holdings, as the Company contends, upon an arbitrary acceptance of the Commission's evidence and a rejection of the Company's. Nor did the Courts, as

the Company contends, fail to consider Appellant's evidence merely because they did not, in opinion, discuss in detail each point raised by the Company. The Company fails to distinguish, on the one hand, between the Court's consideration and analysis of its evidence, and a determination based thereupon (which may be done *aliunde* the opinion), and, on the other hand, a mere failure to disclose in the face of the written opinion all of its reasoning and mental processes, which disclosure is not requisite. It was competent for the State courts to, and they did, not only analyze the Company's evidence thoroughly, but, based upon such analysis, concluded that it failed to measure up to the law's required standard of clarity and satisfactoriness to overturn the *prima facie* validity of the order; and it was also competent for the Courts to give full effect to such parts of the Commission's evidence as were uncontroverted; and to consider the remainder of the Commission's evidence, even though controverted, for use as a check against the acceptability of the Company's evidence:

Los Angeles G. & E. Corp. vs. R. R. Com. of Cal., 289 U. S. 287, 294; 295, 296, 297, 301-302, 309-310, 311, 312; 77 L. Ed. 1180;

St. Joseph Stock Yards Co. vs. United States, 298 U. S. 38, 57-58, 61; 80 L. Ed. 1033.

XI. The complaining party does not meet the burden of proving the invalidity of the order by attacking the evidence adduced by the opposing party, but must himself submit evidence sufficiently clear and satisfactory to overturn the order:

Allen vs. S. L. I. M. & S. Ry. Co., 230 U. S. 553, 560; 57 L. Ed. 1625;

Atlantic Coast Line R. Co. vs. Florida, 295 U. S. 301, 317-318; 79 L. Ed. 1451;
Norfolk & W. Ry. Co. vs. North Carolina, 297 U. S. 682, 689-690; 80 L. Ed. 977.

XII. This Court has been especially reluctant to find rates confiscatory where, as here, they have not been put into effect and given a reasonable trial in actual operation, to eliminate speculation and to determine definitely the volume of business and net revenue that would be produced under the reduced rate:

Knoxville vs. Knoxville Water Co., 212 U. S. 1, 16-17; 53 L. Ed. 371;
Darnell vs. Edwards, 244 U. S. 564, 569; 61 L. Ed. 1317;
Willcox vs. Consolidated Gas Co., 212 U. S. 19, 41; 53 L. Ed. 382;
Georgia Power Co. vs. R. R. Comm. of Georgia, 262 U. S. 625, 633; 67 L. Ed. 1144;
St. Joseph Stock Yards Co. vs. United States, 298 U. S. 38, 49, 72; 80 L. Ed. 1033;
Louisville vs. Cumberland Tel. & Tel. Co., 225 U. S. 430, 433, 436; 56 L. Ed. 1151;
Brush Electric Co. vs. City of Galveston, 262 U. S. 443, 444-446; 67 L. Ed. 1076;
Lincoln G. & E. Co. vs. Lincoln, 250 U. S. 256, 262; 63 L. Ed. 968;
Cedar Rapids Gas Co. vs. Cedar Rapids, 223 U.S. 655, 667-670; 56 L. Ed. 594;
S. & N. Ala. Ry. Co. vs. R. R. Comm. of Ala., 210 Fed. 465; 480.

XIII. Under an actual test of the 55c rate for a reasonable trial period, it is probable, if not certain, under the record here, that an increased attachment of new customers and an increased consumption per cus-

tomer would result, which would more than offset in increased net revenue the amount of the reduction. This probable increase has been measured in volume with reasonable certainty in the record:

Louisiana R. Com. vs. Cumberland Tel. & Tel. Co., 212 U. S. 414, 426; 53 L. Ed. 577;
Willcox vs. Consolidated Gas Co., 212 U. S. 19, 49-50; 53 L. Ed. 382;
Knoxville vs. Knoxville Water Co., 212 U. S. 1, 16; 53 L. Ed. 371;
Brush Electric Co. vs. City of Galveston, 262 U. S. 443, 446; 67 L. Ed. 1076.

XIV. This Court is not concerned with mere irregularities or erroneous methods or reasoning pursued by the Commission, or by the State Courts, but is interested only in determining whether the prescribed rate in its over-all result ("totality of its consequences") falls below the line of confiscation:

Los Angeles G. & E. Corp. vs. R. R. Com. of Cal., 289 U. S. 287, 304-305, 314, 315-316, 317; 77 L. Ed. 1180;
Lincoln G. & E. Co. vs. Lincoln, 250 U. S. 256, 267-268; 63 L. Ed. 968;
Dayton P. & L. Co. vs. Pub. Ut. Com. of Ohio, 292 U. S. 290, 297-298, 309; 78 L. Ed. 1267;
Lindheimer vs. Ill. Bell. Tel. Co., 292 U. S. 151, 175; 78 L. Ed. 1182;
St. Joseph Stock Yards Co. vs. United States, 298 U. S. 38, 49, 69; 80 L. Ed. 1033;
W. Ohio Gas Co. vs. Pub. Ut. Com. of Ohio (Lima Case), 294 U. S. 63, 70; 79 L. Ed. 761;
R. R. Com. of Texas vs. Galveston Chamber of Commerce, 105 Tex. 101. 115-116, 145 S.W. 573, 580.

XV. A corollary is, that even should it be proved that the Commission has made a finding erroneously prejudicial to the complaining party as to some particular element or elements of the rate structure (which was not done here), the complaining party must go farther and prove that other compensating liberalities have not been indulged in its favor by the Commission in the findings and allowances as to other elements of the rate structure:

Los Angeles G. & E. Corp. vs. R. R. Com. of Cal., 289 U. S. 287, 316-317; 77 L. Ed. 1180;
Lindheimer vs. Ill. Bell Tel. Co., 292 U. S. 151, 175; 78 L. Ed. 1182;
Dayton P. & L. Co. vs. Pub. Ut. Com. of Ohio, 292 U. S. 290, 305, 306, 309-310; 78 L. Ed. 1267;
Lincoln G. & E. Co. vs. Lincoln, 250 U. S. 256, 267-268; 63 L. Ed. 968.

XVI. All of the Company's claims of confiscation are bottomed upon the fallacious assumption that the 7% net annual return found reasonable by the Commission, and all of its other findings as to rate base and other elements and subsidiary facts relating to the rate structure, insofar as such findings are favorable to the Company, are sacred and inviolable minima below which the Commission and the reviewing courts are estopped and precluded from going in determining the issue of confiscation; and that, insofar as such findings are unfavorable to the Company, they are subject to its attack. No estoppel or *res judicata* is involved in connection with the findings, either of the Commission or of the inferior reviewing courts. If the Company is free to attack the findings, as being too low, then the

Commission must be equally free to show that they are too liberal:

St. Joseph Stock Yards Co. vs. United States, 298 U. S. 38, 46-47, 56, 63-64, 72; 80 L. Ed. 1033;
Lindheimer vs. Ill. Bell Tel. Co., 292 U. S. 151; 78 L. Ed. 1182;
Columbus Gas & Fuel Co. vs. Pub. Ut. Com. of Ohio, 292 U. S. 398, 414; 78 L. Ed. 1327;
Prentis vs. Atlantic Coast Line R. Co., 211 U. S. 210, 227; 53 L. Ed. 150;
Indianapolis Water Co. vs. McCart, 13 Fed. Suppl. 110, 113.

XVII. The Company's claims of confiscation are likewise founded upon the erroneous assumption that unreasonableness (which is here a question of State law) is the same thing as confiscation, which is a Federal question. The issue before this Court is not whether the 55c rate will yield 7%, or any other reasonable rate of return, but whether it is confiscatory. This distinction should be borne in mind in reading the precedents. Some cases previously before this Court, coming up from inferior Federal Courts, have involved both confiscation and unreasonableness.

XVIII. All of the Company's claims of confiscation are built also upon the untenable assumption that if it be shown that the net revenues under the reduced rate for any particular twelve-months' operating period would apparently have fallen below the 7% level found reasonable by the Commission, that this, *ipso facto*, shows confiscation. In attempting to make such a showing, the Company insisted before the Com-

mission that the latter, in fixing the rate, should only use the operating results for the twelve-months' period ending July 31, 1932, which indisputably was a period deeply affected by the economic depression; and, before the Courts, the Company insisted that the validity of the rate should be tested only by the operating results of the calendar years 1932 and 1933—both of such years being likewise depression years, and 1933 being admittedly (R. I, 86) doubly abnormal because of the unusually high temperatures prevailing during that year. This method was erroneous, first for confining the investigation before the Commission to a single twelve-months' period, which is condemned by the authorities, regardless of abnormalities; and, second, for attempting to have the rate fixed and tested by the results of single twelve-months' periods which were abnormal for two different reasons. The authorities amply establish that the Commission, in fixing the rate, and the courts, in testing it, both for unreasonableness and confiscation, should consider the average results of a reasonable spread of fat and lean years in order to equalize the fluctuations inevitably brought about by abnormalities of all kinds:

Los Angeles G. & E. Corp. vs. R. R. Com. of Cal., 289 U. S. 287, 298-299, 303-304, 311-312, 319-320; 77 L. Ed. 1180;

St. Joseph Stock Yards Co. vs. United States, 298 U. S. 38, 46-47, 55, 71, 72; 80 L. Ed. 1033;

Lindheimer vs. Ill. Bell Tel. Co., 292 U. S. 151, 78 L. Ed. 1182;

Galveston Elec. Co. v. Galveston, 258 U. S. 388, 400, 401, 403; 66 L. Ed. 678, 685, 686;

Lincoln G. & E. Co. vs. Lincoln, 250 U. S. 256, 268; 63 L. Ed. 968;

Darnell vs. Edwards, 244 U. S. 564, 569; 61 L. Ed. 1317;
Brush Electric Co. vs. City of Galveston, 262 U. S. 443, 446; 67 L. Ed. 1076;
Knoxville vs. Knoxville Water Co., 212 U. S. 1, 14-15, 17-18; 53 L. Ed. 371;
Acker vs. United States, 298 U. S. 426, 431; 80 L. Ed. 1257;
West Ohio Gas Co. vs. Pub. Ut. Com. of Ohio, (Kenton Case) 294 U. S. 79, 81; 79 L. Ed. 773, 776;
Municipal Gas Co. vs. Com., 225 N. Y. 89, 98; 121 N. E. 772, 774;
Denver Union Stock Yards Co. vs. United States, 57 Fed. (2) 735, 752-753;
Kings County Lighting Co. vs. Lewis, 110 Miscl. Rep. 204; 180 N. Y. Suppl. 570, 593;
S. & N. Ala. Ry. Co. vs. R. R. Com. of Ala., 210 Fed. 465, 480;
Reno P. L. & W. Co. vs. Com., 298 Fed. 790, 801.

XIX. If it be accepted that the issue of confiscation is to be decided upon the basis of a reasonable spread of lean and fat years, as outlined in Point XVIII above, then it is immaterial as of what date during the spread the refund provision attaches. The process is automatically a self-levelling one. See cases cited under Point XVIII above.

XX. In arriving at its purported percentages of net return in its computations the Company has consistently used one or more or all of the following erroneous bases of calculation:

1. Treating the findings of the Commission as minima, and its 7% as coinciding with the line of confiscation.

2. Disregarding the abnormally high temperatures admittedly prevailing in 1933. See *Los Angeles* case, 289 U. S. 298-299, 303-304, 320.

3. Assuming that there would be no increased consumption under the reduced rate.

4. Assuming that there would be no increased consumption with the return of purchasing power of consumers in recovery from the economic depression.

5. Deducting from available revenue improper charges to operating expenses, both of items found improper and disallowed by the Commission, and of the kinds which, although allowed by the Commission, we contend are improper as charges against public service operations.

6. Deducting from prospective revenues the so-called "non-recurring" industrial revenues previously derived from Central Power and Light Company, and Motor Fuel Products Company, and assuming that there would be no other industrial consumption to take the place of these sales.

7. Failing to take into account the average results of a reasonable spread of years, and insisting upon confining the investigation to a single abnormal twelve-months' operating period before the Commission, and to two doubly abnormal operating periods before the courts.

8. In various computations it combines the findings of the Commission, in so far as found favorable to its uses, with other bases which are departures from the findings of the Commission, in so far as found unfavorable to it.

The composite effect of all these errors removes the claimed results so far from realities as to be useless as a basis for testing the validity of the rate.[11]

XXI. Not only did the Company erroneously insist that no operating results were admissible for any period prior to the twelve-months' period ending July 31, 1932, before the Commission, and the calendar years 1932 and 1933 before the courts, but it even insisted that no evidence of any character whatsoever was admissible for any purpose pertaining to any prior periods of the Company's history. It is our position that evidence as to such prior periods pertaining to the Company's whole history, finances, property and operations was not only admissible but necessary, as bearing upon (a) historical cost, (b) history of the Company, (c) book value of fixed capital, (d) the five structural overhead expenses, (e) reproduction cost new, (f) accrued depreciation (per cent condition), (g) going concern value, (h) cash working capital, (i) fair value, (j) future operating expenses, (k) future revenues, (l) future annual accruals to depreciation reserve, and (m) rate of return for the future.

XXII. The weight to be accorded the testimony of the Company's expert witnesses can not be determined without understanding their approach to the questions and the criteria which governed their estimates. The testimony of such experts shows quite clearly that in

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[11]This is clearly apparent in the computation appearing at pages 14, 34, 36 and 37 of the Company's brief, and the first computation at R. I, 40.

every essential element of the rate structure, and in many details (particularly in computations purporting to apply the 55c rate to the experience of 1932 and 1933 and to project it into the future), they proceeded, in part at least, upon erroneous, conjectural, speculative, unfair, excessive and untenable bases. Their testimony, estimates, and computations are, therefore, in many instances to be rejected as having no probative force in law, and as being "in no real sense evidence.":

St. Joseph Stock Yards Co. vs. United States, 298 U. S. 38, 59-60, 62, 63; 80 L. Ed. 1033;
Los Angeles G. & E. Corp. vs. R. R. Com. of Cal., 289 U. S. 287, 317-319; 77 L. Ed. 1180;
Dayton P. & L. Co. vs. Pub. Ut. Com. of Ohio, 292 U. S. 290, 298-301, 302, 305, 311-312; 78 L. Ed. 1267;
Columbus Gas & Fuel Co. vs. Pub. Ut. Com. of Ohio, 292 U. S. 398, 412-413; 78 L. Ed. 1327;
Lindheimer vs. Ill Bell Tel. Co., 292 U. S. 151, 162-164, 170-175; 78 L. Ed. 1182;
Knoxville vs. Knoxville Water Co., 212 U. S. 1, 18; 53 L. Ed. 371;
United Fuel Gas Co. vs. R. R. Com. of Ky., 278 U. S. 300, 316; 73 L. Ed. 390.

XXIII. In determining the level of net return at which the line of confiscation is reached, this Honorable Court will take into consideration the depressed economic conditions prevailing at the time of the order:

Dayton P. & L. Co. vs. Pub. Ut. Comm. of Ohio, 292 U. S. 290, 311; 78 L. Ed. 1267.

XXIV. The Company's attitude from the inception to this proceeding before the City Council has been

one of studied concealment and non-cooperation rather than of candid revelation. An examination of the record will clearly show this to be true:

Knoxville vs. Knoxville Water Co., 212 U. S. 1, 18; 53 L. Ed. 371, 382.

XXV. The Company, in its evidence and computations presented before both the Commission and reviewing courts, has relied upon "elaborate tabulations of estimates", "at war with realities", which have "proved too much" and "overshot the mark." Although the Company alleged (R. I, 40) that the existing 75c rate as of the date of trial (March and April 1934) had been confiscatory "since February 1931", (shortly after the rate controversy with the City arose, R. I, 216-A, R. II, 737, 1280-1283), and submitted an exhibit purporting to demonstrate that claim by showing net earnings of only 0.92% on its claimed rate base for the twelve months' period ending July 31, 1932 (R. I, 201), it did not, until June 29, 1932, (R. II, 1353-1355) apply to the City for an increase of its domestic rate to $1.50 per MCF—about seven months after the enactment of the City Ordinance of December 15, 1931, (R. I, 9) reducing the rate, and more than seventeen months after it claimed the 75c rate had become confiscatory in February, 1931. Even under this proposed $1.50 schedule according to the Company's exhibit before the Commission (R. II, 1352)[12] it would not, for the

[12]If the $1.50 rate would have earned 4.57% as claimed, the 75c rate on the same rate base, with the same operating expenses, and for the same period ought to have earned more than 0.92% as claimed. One or the other calculation is clearly wrong. See also footnote 14, infra, p. 37.

twelve months ending July 31, 1932, have earned more than 4.57% net upon its claimed rate base. If this were true, it is obvious that the 75c rate had been confiscatory even much earlier than February, 1931. Although the Company's Vice President, Strange, testified that the Company had asked for the increase to $1.50 per MCF in June, 1932, because its investigations indicated it was entitled to the raise (R. II, 1232), yet its Chief Accountant, Womack, in charge of rate cases (R. I, 574), three times stated deliberately that all the Company wished to accomplish was to *maintain* its existing 75c rate (R. II, 1082-1083). Such evidence, therefore, is "of no avail", "fails of the intended effect", and this Court should prefer, and be governed by, "the test of conduct", and refuse to accept such evidence as a basis for finding confiscation. These circumstances, and the Company's own two earlier computations (0.92% and 4.57% referred to above), cast devastating doubts upon all their claims of confiscation herein, and particularly upon their purported application (R. I, 93) of the 55c rate to the experience of 1932 and 1933.[13] See also Point XXVI, E, 1, infra pp. 41-43. "Men do not transact business without protest at confiscatory rates, at all events in the absence of extraordinary circumstances making submission to the loss expedient. If such circumstances exist, the Appellant has not proved them . . . That being so, what the public utility has done belies what it has said":

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[13]See also the computations appearing at pp. 14, 34, 36 and 37 of the Company's brief.

Dayton P. & L. Co. vs. Pub. Ut. Comm. of Ohio, 292 U. S. 290, 311-312; 78 L. Ed. 1267;
Lindheimer vs. Ill. Bell Tel. Co., 292 U. S. 151, 161, 162, 163, 164, 175, 176; 78 L. Ed. 1182.

XXVI. The following is a list of the principal, but not of all, points of controversy between the parties:

A. RATE BASE:

1. As to whether the 26-mile Pescadito-Jennings transmission line was shown to be necessarily used and useful in serving Laredo.

2. As to whether the East Jennings Field gathering system was shown to be necessarily used and useful in serving Laredo.

3. As to whether the West Jennings gathering system was shown to be necessarily used and useful in serving Laredo.

4. As to whether the 7.16 miles of transmission line extending eastwards from Aguilares Junction to Mirando City and Oilton was shown to be necessarily used and useful in serving Laredo.

5. As to whether the Company's voucher J-10-156 (or 157) dated October 21, 1932, constituting journal entry of the transfer of the entire properties of South Texas Gas Company and Texas Border Gas Company upon the books of United Gas Public Service Company at $934,798.02 (including Roma-Jennings transmission line and much other property admittedly not used and useful in the service of Laredo) did not evidence the Company's valuation of same for capital account *on its books*, as of said date of October 21, 1932.

6. Preliminary and organization expense.

7. Administrative and legal expense.

8. Interest during construction.

9. Taxes during construction.

10. Engineering and supervision.

11. Going concern value; and whether it is essential that a separate allowance for same be made as such, besides valuing the component parts of the properties with full overheads and as a going concern, with trained personnel, and existing business attached.

12. Extent of accrued depreciation (per cent condition) of the properties.

13. Cash working capital.

B. OPERATING EXPENSES:

1. Propriety of 1c per MCF gathering charge for gas from Carolina-Texas Field charged to South Texas Gas Company by affiliate, Southern Gas Company.

2. Even if Pescadito-Jennings transmission line and East and West Jennings gathering systems be considered necessarily used and useful in serving Laredo, (which we do not admit is proper) the evidence shows only 1.53% of volume from Jennings Field actually sent to Laredo, but Company erroneously allocated 52.9% of Jennings gathering system expense to Laredo. (R. I, 558, R. II, 805).

3. Whether transmission system operating and maintenance expense within the Laredo area should be pro-rated to Laredo upon basis of volumes of deliveries in MCF as was done by the Commission's accounting witness, Lewis, or upon the basis of weighted lineal mileage and 3 inch equivalent pipe mileage as was done by the Company's accounting witness, Womack.

4. Propriety of "pipe line rentals" charged to South Texas Gas Company by affiliate, Southern Gas Company, for claimed use of transmission line from Jim Hogg Junction to Jennings Junction (see map, appendix to this Brief, or R. II, 1405), which line is plainly not used and useful or necessary in the service of Laredo, but is used exclusively in the service of Monterrey, Mexico, and other areas.

5. Propriety of management fees charged to the Company by affiliated holding companies.

6. Propriety of uncollectible bills.

7. Propriety of donations.

8. Propriety of general expense pro-rated from affiliated companies.

9. Actual cost of gas purchases; the Company attempting to add to the actual prevailing well-head prices certain claimed additional cost for geological and exploratory expenses.

10. The record shows that during 1930, when the Company's revenues began declining sharply due to the depression, its general expense, in contrast, rose

sharply and continued to rise throughout the year 1932. (See chart, R. II, 1380-A, also 761-763). This precludes the use of such operating expense for the purpose of showing confiscation in a rate case:

Reno P. L. & W. Co. vs. Comm., 298 Fed. 790, 801.

C. ANNUAL ACCRUALS TO DEPRECIATION RESERVE:

That not only were the Company's estimates of necessary annual reserve accruals to the depreciation fund for the future grossly excessive (5% on distribution properties, 6% on transmission properties, and 10% on gathering systems, R. I, 181-182, 708),[14] but the 3% allowed by the Commission was unduly liberal to the Company, as evidenced by the following facts:

1. The actual accruals to the reserve in the past had, as of October 21, 1932,[15] built up an unexpended

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[14]We are unable to reconcile the bases on which the Company calculated its "allowance for reserve" of $55,545.98 in its computation appearing at R. I, 201, and the amount of $66,039.00 "allowance for reserve" in R. II, 1352, as both computations were presented before the Commission, use the same claimed rate base, and are intended to reflect operations over the identical 12-months' operating period, ending July 31, 1932.

[15]The date on which the entire properties were transferred to United Gas Public Service Company (R. I, 238-A)

balance of $499,707.47, after being charged with all retirements, (R. I, 238A, 244) which sum is grossly out of proportion with the amount of *accrued depreciation* in the property, even as found by the Commission, and even more so when compared with the Company's claims as to accrued depreciation. The only evidence as to actual accrual rates employed by the Company in the past was, that from 1928 to June, 1930, it had been 2% on distribution and 3.75% on transmission, (R. II, 882-884, 1298-1299, 1329-1330). Indeed, it is strongly probable that the actual accumulation greatly exceeded the above figure; for Lewis, Commission's accountant, testified (R. I, 244) that it was impossible to ascertain the true balance, for there were several mergers, and each time the properties changed hands the accumulation was "wiped out and they started over."

2. If accrued historically from the beginning of the properties to July 31, 1932, at only 2% (as Elrod testified was adequate, R. II, 1332), the fund would have exceeded, by $5,557.83, the total charges to retirements. (R. II, 1374A).

3. At 3% the Company would have had a balance of $135,349.81 as of December 31, 1933. (R. I, 238, 238A, 245).

4. If set aside at 5%, the balance would have been $391,933.18 as of July 31, 1932. (R. II, 1374A).

5. There is inconsistency in the Company's method of computing future and accrued depreciation. In estimating accruals for future depreciation, it takes into account loss of service value brought about not alone

by physical deterioration, but by inadequacy, obsolescence, change of operating conditions, public requirements, lapse of age life, and all other causes; but in estimating the per cent condition of the property, for the purpose of determining the base upon which it shall be allowed to earn, it uses only observed depreciation, or physical deterioration which is palpable to the eye. (R. I, 364-367).

D. PROBABLE FUTURE REVENUES:

1. Probable increase of customer attachment and per-customer consumption under reduced rate.

2. Probable increase of consumption with returning purchasing power recently attenuated by economic depression.

3. Increase of consumption with return to normal temperatures from the admittedly abnormally high ones of 1933.

4. Propriety of deducting so-called "non-recurring" industrial revenues in estimating for the future and assuming there would be no other industrial sales to take their place.

5. The Company is estopped to urge that in estimating future revenues the so-called "non-recurring" industrial revenues derived in the past from sales to Central Power & Light Company, and the Company's affiliate, Motor Fuel Products Company, should be deducted; because the sharp decline and alleged non-recurrence of such revenues are shown plainly to have been well-known to the Company before the hearing by the Commission in October and November, 1932,

and the record reveals that the failure or alleged non-recurrence of such revenues was in no way pointed out or called to the attention of the Commission by evidence or otherwise in such hearing:

Western Distributing Co. vs. Pub. Serv. Comm. of Kansas, 58 Fed. (2d) 241, 243 (Aff. 285 U. S. 119; 76 L. Ed. 655);
St. Joseph Stockyards Co. vs. United States, 298 U. S. 38, 47-48, 53-54; 80 L. Ed. 1033;
Manufacturers R. Co. vs. United States, 246 U.S. 457, 470, 488-490; 62 L. Ed. 831;
C. N. O. & T. P. Ry. Co. vs. Interstate Commerce Comm., 162 U. S. 184, 196; 40 L. Ed. 935.

6. The record shows a deliberate driving away by the Company of its existing and potential industrial business and revenues in Laredo, resulting in an unjust and unnecessary loading of its Laredo operating costs.

7. The record shows flagrant and inexcusable discrimination against Laredo in the prices of industrial gas charged by the Company to industries in the twin city of Nuevo Laredo, Mexico, directly across the Rio Grande River, resulting in driving away profitable industrial business in and around Laredo, and in unduly burdening the Laredo operating costs.

8. The record shows gross discrimination against Laredo in the Company's charges for domestic gas in Laredo and its gate charge for domestic gas at the City gate of Nuevo Laredo, Mexico, which gas destined for Nuevo Laredo originates in the same sources of supply, is transported through the same transmission

lines, through the Laredo City Gate and through the Laredo distribution system, thus unduly burdening the Laredo operating costs.[16]

E. RATE OF RETURN.

1. The Company contends for a net return of 10% per annum; plus the following percentages for annual depreciation reserve:

5% on distribution property;

6% on transmission property;

10% on gathering systems. (R. I, 708).

If allowed, this sum would equal the entire cost of distribution property in approximately 7½ years; transmission property in approximately 6 years; and gathering systems in 5 years.

Under the 75c rate, voluntarily fixed and adhered to by the Company, according to its schedule before the Commission, for the 12 months' operating period ending July 31, 1932, it earned only 0.92% net, on its claimed rate base, after setting aside a composite of 4.43% for annual depreciation on all three classes of properties (R. I, 201).

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[16]See also R. I, 614, R. II, 1358-1364, 1364-1366, where it is shown that the Company was selling, for 12c per MCF, at the Roma gate, (47 miles south of the Jennings Field, R. II, 1217, 1405) gas obtained from fields in the Laredo area, and destined for Monterrey, Mexico, and other Mexican markets, and on which it is stipulated (R. II, 1361) that this price is calculated to yield the Company 10% net per annum on its investment.

According to its pleadings in the District Court (R. I, 40), after setting aside 3% for annual depreciation, as allowed by the Commission, it would, for the following periods, under the 75c rate, (which it alleged had been confiscatory since February, 1931) have earned only the following percentages on its claimed fair value rate base of $1,225,000:

For the 12 months Ended	Percent of $1,225,000
March, 1932	2.76%
July, 1932	2.48%
October, 1932	1.51%
December, 1932	1.80%
March, 1933	1.25%
July, 1933	0.44%
October, 1933	0.37%
December, 1933	Deficit of $1,037.05

The Company did not, until June 29, 1932, (R. II, 1353-1355) (nearly seven months after the City ordinance reduced its rates and seventeen months after it alleged the 75c rate had become confiscatory) apply to the City (and later to the Commission) for an increased domestic rate of $1.50 per MCF; under which proposed rate, according to its computation before the Commission, (R. II, 1352, 1352-A), it would only have earned for the year ending July 31, 1932, 4.57% net, upon its claimed rate base, after setting aside annual depreciation at a composite of 5.27% upon the three classes of property.

There is no evidence in the record before this Court that a 10% net return (after depreciation) is necessary to insure the Company's credit, or induce a free flow of capital.

The Commission found 7% net per annum would be *reasonable*.

The line of confiscation would be considerably lower than 7%, especially in view of the rate of net return (4.57%) which the Company has indicated, as above shown, that it would consider satisfactory and compensatory.

This Court should take judicial notice that the substantial net return which the Company is certain to earn under the 55c rate is not shown to be confiscatory.

Knoxville vs. Knoxville Water Co., 212 U. S. 1, 17; 53 L. Ed. 371, 381;
West vs. Chesapeake & Pot. Tel. Co., 295 U. S. 662, 683; 79 L. Ed. 1640, 1653 (dissenting opinion).

ARGUMENT

We adopt as a part of this Argument the preceding Summary. In the Argument we shall supplement the Summary only as to the particular points which seem to require elaboration and further record references; and in so doing we shall, so far as possible, divide and number the points of Argument to conform with the points in the Summary.

POINT I.

(See p. 16, supra)

At p. 75 of its Brief, the Company refers to the action of the City Council in reducing the rate as being "summary," thus leaving the inference that the action was taken without evidence or investigation. The record reveals that this matter was under investi-

gation and consideration by the Council for a period of more than nine months before the ordinance was enacted (R. I, 216A, R. II, 1280-1282, 737). And the record as a whole will reflect how secretive, misleading and non-cooperative the Company was, not only before the City Council (R. II, 1353-1355) but also before the Commission and District Court.

The Company pleads (R. I, 33) that the order of the Commission was entered "without notice." But see the same page where the Company pleads that it was made after full hearing. And the Commission's opinion (R. I, 11) recites that the hearing was had October 4-11, and November 9-14, 1932, at which time both parties presented their evidence, resulting in a stenographic record of some 1400 pages, and of more than 20 exhibits containing several hundred pages; and that after the hearing, counsel for the Company and the City prepared and filed with the Commission exhaustive briefs.

POINTS V, VI, AND VII.

(See pp. 18-20, supra)

The Company has attempted to make it appear that the Court of Civil Appeals has accorded it no judicial appellate review conforming to the requirements of the due process clause, under the *Ben Avon Borough* case, in that it has, in its opinion, indicated that it approached the review with its mind foreclosed against the Company; and that it has announced a rule which imposes upon utilities an impossible burden. The

argument is based principally upon the statement of the Court of Civil Appeals (R. I, 424, 89 S. W. (2d) 1102) "That in advance of any actual test of the practical result of the new rate the Court on appeal will not disturb the rate where it is based upon conflicting evidence as to valuation of property or as to any other item used as a basis for the calculation of the rate."

It is contended, first, (p. 30 of its "Statement as to Jurisdiction" and pp. 31-32, 53 of its Brief) that it was impossible for the Company to test the reduced rate in actual operation because the 40c ordinance rate was suspended from January 1, 1932, to June 13, 1933, by the appeal of the Company from the City Council to the Commission; and that subsequent to the Commission's order of June 13, 1933, the putting into effect of the 55c rate was prevented by the voluntary action of the Commission and City. The inference is that during both of said periods the Company was itself *restrained* from putting the reduced rate into effect. This inference is totally unfounded. It was the Company's own appeal from the City ordinance to the Commission, which originally suspended the effect of the ordinance rate; and it was the Company's own action in securing temporary restraining order and interlocutory injunction from the Federal District Court that caused the State, Commission and City to institute the suit in the State District Court, where, in order to comply with Section 266 of the Judicial Code as amended, it was necessary that the authorities consent to a voluntary stay order restraining *them* from enforcing the rate, (R. I, 33, 28-30). It is only the public authorities that have been under restraint from enforcing the reduced rate, and the Company has

been under no restraint at any time from voluntarily putting it into effect.

If the Company had given the reduced rate an actual test, and experience had shown it confiscatory, the Company had two effective remedies at its command, neither of which it has invoked: 1. Application to the Commission for modification before filing any suit. 2. Application to the three-judge court, after filing suit, pursuant to provisions of its stay order (R. I, 30) wherein jurisdiction is retained for all purposes.

It is argued, second, that under the rule announced by the Court of Civil Appeals it would be impossible for a utility ever to set aside a rate order because the Commission can always easily produce some evidence which has a tendency to substantiate the reduced rate, and thus make the evidence "conflicting."

It is necessary to distinguish between what the Court has said, and what it has done. *Dayton* case, 292 U. S. 290, 296, 298, 302, 303. What the Court has actually done, as will be seen by an examination of its entire opinion, is to review the Company's evidence in its entirety (though the Court did not, and was not required to, disclose in the opinion its entire reasoning and mental processes by which it arrived at its conclusion, nor review in detail all of the evidence): and, based upon such complete review and analysis of the evidence it concluded, as a preliminary question of law, that the Company's evidence was not sufficiently clear and satisfactory to overturn the *prima facie* validity of the Commission's order. (R. I, 414; 422, 89 S. W. (2d) 1097, 1101). In so doing it has but

followed the principle clearly laid down by it in *Railroad Commission vs. Shupee*, 57 S. W. (2d) 295, 301, aff. by the Supreme Court of Texas, 73 S. W. (2d) 505, 508, and which principle we have quoted in footnote 10, page 19, supra. That principle is in complete consonance with the method pursued by this Court in reviewing the evidence in cases of this type; some of this Court's decisions, so treating the matter, being cited under Points II, IV and XXII, herein.

It is further argued that the judgment of the Court of Civil Appeals was based upon an arbitrary rejection of the Company's evidence *in toto*, and an unquestioning acceptance of the Commission's evidence. How unfounded this argument is, becomes clear in the light of what we have said, and in the light of the Court's opinion as a whole. The Company has followed the same method in discussing the Court's opinion that it has in designating the parts of the record—it has selected only certain parts of the opinion, which, standing alone, seem most unfavorable to the Company; and has disregarded the remainder of the opinion.

The Company also argues that it has attempted vainly to secure a judicial review of its case, on the merits, in the Supreme Court of Texas; but we have already answered this contention at pp. 14-15, hereof.

POINTS VIII, IX, AND X.

(See pp. 20-22, supra)

The Commission made detailed findings as to allocations, preliminary and organization expense, ad-

ministrative and legal expense, engineering and supervision, taxes during construction, interest during construction, materials and supplies, cash working capital, fair value of gathering systems, transmission systems, and distribution systems used and useful, reproduction cost new of entire plant, accrued depreciation, and overall fair value of $885,000 as the rate base upon which the Company is entitled to earn a fair return; it found that neither the West Jennings gathering system nor the Pescadito-Jennings transmission line was used or useful, or even necessary as standby equipment, but nevertheless included those properties in the rate base at a value of approximately $135,000 (R. I, 13-25).

It found that inasmuch as all component parts of the property had been valued as a going, active concern, with all existing business attached, personnel trained, and with ample overheads allowed, therefore no separate allowance for going concern value as such should be made (R. I, 18, 25).

It also found that a depreciation reserve annually in the future, equivalent to 3% of its fair value of $885,000, would be "ample" (R. I, 21).

It found that a net return of 7% per annum upon such fair value would be "adequate" (R. I, 25).

Based upon a stipulation of the parties, it found that a wellhead price of 5c per MCF was reasonable for gas purchases (R. I, 11). It made certain subsidiary findings as to other future operating expenses, and disallowed one half of the 1c per MCF gathering charge imposed upon South Texas Gas Company by

it affiliated producer, Southern Gas Company (R. I. 23); disallowed all charges for "pipe line rentals" imposed upon South Texas Gas Company by its affiliated producer, Southern Gas Company, for purported use of the tie-in line (not necessary or useful in serving Laredo) between Jim Hogg Field and Jennings Junction;[17] disallowed management fees; and allowed "reasonable compensation" in connection with "loss on bad debts, general expense, advertising, maintenance of general structures, donations, testing mains for leaks, and Laredo rate case expense (amortized over a period of ten years)".

It did not make a definite dollar finding of the total amount of estimated operating expense for the future, or future revenues, but it did make certain subsidiary findings as to future revenues; and, taking into account the average of the four-year period beginning June 30, 1928, and ending July 31, 1932, it found that an average of the revenue and expenses for such four-year operating period "constitutes the test period for the computation of the rate structure upon which a fair return is to be predicated" (R. I, 22-23).

Based upon these findings it found that the 55c rate would produce a net annual return of 7% on the fair value.

Although the Company in its Brief seems to place principal emphasis upon its assignments contending that the 55c rate is actually confiscatory, yet under certain of its assignments it contends, (a) that the Commission's order is void for lack of essential supporting

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[17]See map, R. II, 1405, or appendix this Brief.

findings of fact, in that the Commission did not make exact dollar findings as to future operating expenses or revenue, and certain other facts subsidiary to those two elements of the rate structure, or as to the various elements of the rate structure for the 18 months for which refunds were ordered (the whole of 1932 and the first six months of 1933); and (b) that it has been deprived of that type of judicial review required by the due process clause, as interpreted in the *Ben Avon Borough* case, in that none of the State Courts has made detailed "independent findings of fact" upon each of the ultimate and subsidiary elements entering into the rate structure, as above outlined.

The cases which we have cited under Point VIII show conclusively that in the absence of some constitutional, statutory or court rule provision requiring findings of fact by the Commission or by the reviewing courts, such findings are not necessary to the validity of the Commission's order, or to the regularity and validity of a judicial review thereof. The Company has not cited, nor is there in existence, any provision of the Texas Constitution or statutes requiring any findings of fact whatever to be made by the Commission; and in this situation no such findings are required: *Texas Motor Coaches vs. Railroad Commission of Texas,* 59 S. W. (2d) 923, 926, aff. 123 Tex. 517, 73 S. W. (2d) 511; *Pacific States Box & Basket Co. vs. White,* 296 U. S. 176, 186; 80 L. Ed. 138; and even if such findings were required by some valid legislative rule, yet their absence would not entitle the Company to set aside the order unless it could go further and show substantive injury through actual confiscation: *United Fuel Gas Co. vs. Railroad*

Comm. of Ky., 278 U. S. 300, 309-310; 73 L. Ed. 390; *Premier-Pabst Sales Co. vs. Grosscup*, 298 U.S 226, 227; 80 L. Ed. 1155; *State Corp. Comm. vs. Wichita Gas Co.*, 290 U. S. 561, 568-569; 78 L. Ed. 500, 504; *Terrace vs. Thompson*, 263 U. S. 197, 214; 68 L. Ed. 255, 274.

As to the absence of judicial findings of fact the Company, at pages 46, 76 and 78 of its Brief, cites certain cases to the proposition that such findings are essential to *due process*. None of the cases supports the contention. With the single exception of one dictum, noted below, they do not relate to judicial findings, but only to findings by legislative or administrative agencies. They fall into two main groups—first, those involving specific State and Federal statutory requirements for such administrative findings, or the requirement of this Court's equity rule 70½, for judicial findings by inferior Federal Courts in equity cases, none of which requirements is applicable here; second, certain cases of which *Mahler vs. Eby*, 264 U. S. 32, 68 L. Ed. 549, is a typical example, where it is held, in interpreting statutes creating certain administrative boards or offices that the board or agency must make the necessary quasi-jurisdictional findings of fact to support its authority to act. In *Mahler vs. Eby*, supra, the Secretary of Labor was empowered to order the deportation of undesirable aliens only upon an affirmative finding of fact that the accused was not only an alien, but an undesirable one. No such finding had been made; and for lack of this quasi-jurisdictional finding the order was stricken down. No such situation is presented in this case.

The nearest the Company has come to showing that judicial findings are essential to due process, is a dictum in each of two cases:

In *Wichita R. & L. Co. vs. Commission*, 260 U. S. 48, 58-59, 67 L. Ed. 124, 130, the statute of Kansas empowered the Kansas Commission to reduce existing rates only upon an affirmative administrative finding, specifically required by the statute, that such existing rates were unreasonably high; and for lack of such finding, the order was (in the absence of a state court interpretation of the statute) stricken down; and in the course of the opinion, this Court merely remarked that "This conclusion accords with the construction put upon similar statutes in other states . . . Moreover, it accords with general principles of constitutional government."

In *B. & O. R. Co. vs. United States*, 298 U. S. 349, 368-369, 80 L. Ed. 1209, 1224, in affirming judgment upholding the validity of an Interstate Commerce Commission order, this Court merely remarked in dictum that the due process clause "includes the right to introduce evidence and have judicial findings based upon it." The cases cited by Mr. Justice Butler in support of that statement (headed by the *Ben Avon Borough* case) in no instance hold more than that due process requires an *open mind*, and *freedom to act*, with reference to the facts, upon the part of the reviewing court, (which, as already shown, the State courts had and exercised in this case), without being conclusively bound by the findings of the legislative or administrative body. And certainly none of them goes the length of holding, as is argued by the Company here, that due process requires actual, express and

detailed *judicial findings* in every case, whether required by statute or court rule or not.

XIII, AND XXVI, D, 1, 2, 3, 4, 6, 7 and 8.
(See pp. 23-24, 39, 40-41, supra)

The population of Laredo is approximately 35,000[18] (R. I, 332, 705; R. II, 944).

Mr. Strange, the Company's Vice President in charge of distribution activities, (R. I, 338) expressed the opinion that the point of customer saturation and maximum-per-customer-use had been reached in Laredo (R.I, 339; R.II, 1061), and that a reduction of rates in Laredo would not produce an increased number of customers, nor increased use per customer, but would result only in reducing the amount of net revenue (R. II, 1061, 1065). Stein, the Laredo District Manager, expressed the same opinion (R. I, 625-626, 630).

Strange admitted on cross examination that although the Company serves approximately 115 cities and towns in Texas, it had never reduced its domestic rates in any Texas town, and therefore, had no way of knowing whether or not increased consumption would follow a reduction in rates (R. I, 346; R. II, 1070). Strange attempted to bolster up his said opinions by a purported study of the experience following

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[18]The official United States census shows the following decennial population in Laredo:

Census, year 1910 14,855 inhabitants,
Census, year 1920 22,710 inhabitants,
Census, year 1930 32,618 inhabitants,

The number of meters and volume of consumption increased correspondingly over the same period. (R. I, 628-629).

a rate reduction in 1931 by another company operating in Amarillo, Texas, (where this Company does not operate, R. I, 346; R. II, 1070). He testified from hearsay that the existing rates in Amarillo had been reduced by 24.52% (R. II, 1066) as compared with the reduction ordered in Laredo of 18.5% (R. II, 1079), and that instead of increasing net revenues in Amarillo, the reduction was followed by a decrease of 23.34% in net revenues (R. II, 1066). Strange did not testify as to what year this claimed decrease occurred; but he was testifying in March and April, 1934, and it should not be difficult to surmise what year he chose. The comparisons between Amarillo and Laredo are set forth at R. I, 339-343 and R. II, 1062-1066.

Strange admitted that the circumstances at Laredo and Amarillo were not comparable, because Amarillo is located on the windswept, treeless, staked plains in the extreme northern Panhandle of Texas, where there is not even a native mesquite root for fuel consumption within a radius of 125 miles, and where the winters are very much more severe than in Laredo, the latter town being 800 miles South of Amarillo and having ample supplies of native wood in the surrounding territory, and having also large production of fuel oil and gas in numerous fields closely surrounding the City. He did not testify as to whether there was a competing gas system in Amarillo; nor did he testify as to the prices from which and to which the domestic rate was reduced in Amarillo, nor whether the rate reduction affected industrial and commercial sales, as well as domestic.

It is a matter of common knowledge that there is a point in the price of gas, or any other commodity, analogous to the point of diminishing returns, below which a reduction in rates will not produce increased consumption or net revenues. And it is obvious that in a place such as Amarillo, where the only competitive fuels are coal or petroleum and its products necessarily transported over long distances, the consumers are forced to attach to the gas system early and use gas continuously no matter what its prices.

Strange also testified that in Sinton and Robstown (of about 4,000 and 6,000 population respectively, located approximately 200 miles south and east of Laredo) the Company had experienced a greater per-customer consumption at higher rates than in Laredo; but, similarly, conditions were not shown to be comparable with Laredo (R. I, 341; R. II, 1062-1067).

The Company has always enjoyed a monoply of the gas business in Laredo (R. I, 702, 703).

Strange testified that the Company has never tried reducing its industrial rates to any customers in Laredo except the American Service Company, an ice plant which is purely a seasonal business, and the amount of its output is necessarily governed by the seasonal consumption of ice; and this occurred in 1932, (R. II, 1070), when the depression had affected all industries (R. II, 1072, 960).

On the contrary the record showed that the Company had arbitrarily increased its price for industrial gas in the second bracket from 16c to 18c per MCF, January 1, 1929, (R. I, 543-544, 700) and this increase in price had continued in effect until the trial in 1934. There is a strong suspicion, suggested in cross

examination of Company witnesses, that the Company not only refused to lower its industrial rate, but made this arbitrary raise, because Central Power and Light Company was contemplating building a new, enlarged plant in Laredo (Randall R. I, 548) and the Company feared the competitive electricity would trench upon its gas sales to irrigation plants up and down the Rio Grande River. But the trial court cut off cross examination along this line. (R. I, 547). See, however, R. I, 545, 546, 547, 548, 549, 550, 551; Neiswanger, R. I, 543-544; Stein, R. I, 610-611.

The effect of this policy upon industrial consumption in and around Laredo, including use for powering irrigation pumps up and down the Rio Grande River from Laredo, and that there is ample potential industrial revenue to offset the loss of the claimed "non-recurring" industrial sales, is reflected in the testimony of Neiswanger, R. I, 543-544; Randall, R. I, 109-110, 544-552; Stein, R. I, 610-611, 630-640; Martin, R. II, 939-941; Walker, R. II, 948-962; Hausmann, R. II, 962-971; Scales, R. II, 971-974; Irvin, R. II, 975-980; Lewis, R. I, 265-266, 290-291; R. II, 767.

The record exhibits some very striking discriminations against Laredo consumers, in favor of other nearby consumers, similarly situated. For instance it is shown that although all gas consumed in Laredo's twin city, Nuevo Laredo, just across the river from Laredo, is obtained by the Company from the same sources of supply, transported by it through the same transmission lines, through the Laredo city gate, and through the Laredo distribution system, as is the Laredo gas, (Lewis, R. I, 265, R. II, 766-767), the

Company only charges the Mexican distributing company in Nuevo Laredo 30c per MCF for domestic gas delivered at the International Bridgehead meter between the two points (Stein, R. I, 720); and it charges for industrial gas delivered at said meter for use in Nuevo Laredo only 12c per MCF as against 18c and 20c in Laredo (Stein, R. I, 721; Contract, R. II, 1356-1358). This 12c industrial rate for Nuevo Laredo is based upon 85% of 14½c; Martin, R. II, 939-941.

Strange admitted that the Company had reduced the price of industrial gas in Nuevo Laredo and that this had resulted in the re-attachment of industrial customers who had abandoned the use of gas on account of its price, and in an immediate increase in industrial consumption, although he said that because of the depression and reduced production, the industries were not using as much as they previously used, (R. II, 1070-1072).

The Company, also, was selling gas at the Roma gate (47 miles south of Jennings Junction, R. II, 1217; Map, 1405) for 12c per MCF, (R. I, 614; R. II, 1358-1364, 1364-1366); and it is recited in the Roma contract (R. II, 1361) that this price on gas, destined for Monterrey and other Mexican markets, is calculated to yield the Company 10% annual return on its investment.

During all these happenings, the depression was wreaking its havoc among the consumers (R. II, 885, 960, 1225, 1227, 1070, 1072; R. I, 86), though by March, 1934, conditions were improving (R. II, 960, 1056-1057).

On the other hand, the Commission's witness Martin, Mayor of Laredo, who had made a study of the Laredo situation and had known it for years, testified that in his opinion, under the 55c rate, there would inevitably be an increase of customers attached of approximately 1200 to 1500 meters (at a minimum rate of $1.00 per month each, R. I, 25, and a larger amount if their consumption exceeded that amount, R. II, 945, 1034, 1039). These additional minimum bills alone would produce a minimum gross revenue of $12,000 per year additional. Mr. Martin, in his study and estimate, took into consideration the comparative purchasing power of the potential new customers, the part of the City in which they resided and the amount of investment they would have to make in gas equipment (R.II, 945-947).

Mr. Martin further said that for more than two years before the trial in 1934, approximately 100 motor trucks had been hauling fire wood from his ranch, 65 miles northwest of Laredo, into the city for domestic fuel consumption, and making a good profit on it. His testimony is especially important. Besides estimating and measuring with the greatest practicable degree of certainty the amount of increased consumption to be expected under the reduced rate, he gave the factual data on which it was based. The particular features of his testimony may be found as follows: number of new customers, R. II, 1034; location of new customers in City, R. II, 1039-1041 and block map of City 1404; cost of customer installations of gas equipment, R. II, 947; amount of wood hauling, R. II, 945-946, 1033-1034.

The definite opinion that the ordered reduction would produce both a substantial number of new customers, and a substantial increase of use per-customer, was expressed by all of the following Commission's witnesses who were familiar with the situation: Walker, R. II, 948-949, 954; 960-961; Hausmann, R. II, 963-966; Hausmann testified also that his packing plant had been forced to abandon the use of industrial gas because of high price charged by the Company, and forced into the oil business in order to use fuel oil; and that his company would be glad to resume the use of gas if the price were lowered to that being enjoyed by the industries in Nuevo Laredo, R. II, 969-971; Scales, R. II, 974; Irvin, R. II, 978; Montgomery, Economics Professor in the University of Texas, specializing in study of public utilities, R. II, 1045-1051, 1050; Fowler, R. II, 1092, 1093. Walker testified he had observed a great deal more hauling of wood to Laredo for domestic fuel in the past two or three years than ever before (R. II, 954-955).

One of the Company's chief contentions has been that in order to serve gas cheaply and profitably it must sell large volumes and keep its line capacity fully utilized at all times (R. I, 598). This was the main basis on which it attempted to justify the low prices it had given to the Mexican markets of Monterrey and Nuevo Laredo. As to Nuevo Laredo, the only reason that exists for its sales there is to use up at a profit some of its excess line capacity leading to Laredo; for it was shown that the Nuevo Laredo gas all went through the Laredo facilities (R. I, 265, 766-767). But let us examine the Company's attitude when the subject

was broached of using up some of its excess Laredo line capacity by selling additional volumes to Laredo domestic and industrial users on the American side at a cheaper rate:

Company's witnesses Stein and Strange admitted that the Company does not wish to attach the additional domestic consumers in Laredo whom Mayor Martin testified could be induced to connect under a reduced rate; because, in their opinion, the customers would not be profitable—the cost of additional installations and service would exceed the additional revenue; (R. I, 343-345, 607, 630; R. II, 1067-1069). The Company did not, however, supply any underlying data on which that assumption was based. At p. 71 of its Brief the Company contends that it was the duty of the City and Commission to prove that the additional revenues would exceed the cost of additional service, and that their failure to do so is fatal. We emphatically question that contention. The knowledge as to the cost of additional installations and service was peculiarly within the knowledge and means of ascertainment of the Company. But, notwithstanding our repeated attempts to elicit from the Company's experts data showing such additional cost, they consistently failed and refused to produce any such data or even to express any general opinion about it. They not only professed their utter inability to figure the cost of additional service, but even expressed doubt or complete ignorance as to whether there was any excess line capacity leading into Laredo—and this in the face of the following overwhelming facts:

The peak consumption in Laredo was 1,022,849 MCF for the year ending June 30, 1930 (R. II, 765).

The low mark was 309,075 MCF for 1933 (R. II, 764). Any school boy would recognize that this means a substantial unused line capacity in the Laredo transmission facilities in 1932 and 1933. Yet repeatedly the Company experts would not admit the existence of any excess line capacity, and said they could not ascertain the cost of transporting and serving additional volumes: Strange, R. I, 347, R. II, 1072-1076, 1074; Abernathy, R. I, 663-665; Dickerson, R. I, 699-700; Womack, R. I, 590-602; Stein, R. I, 636-637, 639.

The City and Commission having shown that there would be substantial and definite additional revenue of at least $12,000 per year from the additional 1200 or 1500 domestic consumers who would attach under the reduced rate, even figuring them all at the minimum of $1.00 per month, the duty devolved upon the Company to show, if it could, that the cost of new installation and additional service would exceed the amount of the additional revenues. It not only did not prove this, but failed to adduce any evidence countervailing against the Commission's evidence upon these points.

The Company also based its conclusion, that the additional cost of service would exceed the additional revenue, in part upon its estimate of what the additional domestic consumers would use. To calculate this, it took the average domestic consumption for Laredo (3700 cu. ft. per month, R. II, 1067, 1077) for the admittedly abnormally warm depression year 1933 (R. I, 86), and estimated that the additional domestic consumers would in the future use less than half this low 1933 average domestic volume per customer.

Although in the calendar year 1933 the Company's net revenue reached the lowest ebb of its history—not only because of the depression and the admittedly abnormally high temperatures of the winter of 1932-1933 (R. I, 86), but because also of its arbitrary failure and refusal to reduce its domestic and industrial rates to conform to the times and the conditions, and its arbitrary raising of its industrial rates in 1929—yet the record shows that conditions were, at the time of the District Court trial in 1934, definitely on the upswing (R. II, 960, 1056-1057), and this court judicially knows that such improvement has continued. *B. & O. R. Co. v. United States*, 298 U. S. 349, 379, 80 L. Ed. 1209, 1230.

The operating figures in this record, subsequent to the date of entry of the Commission's order, cover a period of only a little more than six months (June 13 to December 31, 1933). And the 55c rate has never been actually put into effect.

The Company's Chief Rate Accountant, Womack, testified that in making his exhibits computing what he estimated the 55c rate would have yielded in 1932 and 1933, and would yield in the future, he assumed the actual consumption under the existing 75c domestic rate and the 18c and 20c industrial rates, and that no additional consumption would have been enjoyed under the 55c domestic rate (R. I, 584-586, 92-93, and Company's Brief, pp. 36-37).

In contrast to the Company's claim of complete customer saturation in Laredo, it is interesting to inspect the block-map of the city, furnished by the Company to the City as of March 9, 1931, soon after this rate

controversy had its inception, R. II, 1404. Observe what a small proportion of the entire area of the city is reached by the Company's existing lines. Martin's testimony showed that most of the new customers would be obtained in areas already reached by the Company's lines, (R. II, 1039-1041), but in addition this map shows large areas of the City not yet reached by the existing lines.

XIX

(See p. 28, supra)

The Company under its Point VIII, (Brief, pages 64-74), complains with extraordinary bitterness of the provision in the Commission's order requiring refunds from January 1, 1932, to June 13, 1933, (date of entry of the order) because, it says, the undisputed evidence shows that during the calendar years 1932 and 1933 its net earnings even under the 75c rate did not equal 7%—which, again, it erroneously assumes to be synonymous with "confiscation." We have endeavored to show, under our Point XVIII, supra, that not only the Commission in fixing the rate, but the reviewing courts in testing it for unreasonableness and confiscation, should not base the result solely upon the operating figures of any single twelve-months' operating period, no matter how normal, and especially should not do so when the selected period or periods are abnormal, as admittedly they are here; but should base their results upon the average of a reasonable spread of fat and lean years, so that the fluctuations, which inevitably will occur from year to year, from abnormalities of every kind—such as ab-

normally high temperatures, economic changes, and extraordinary expense of operation—will be ironed out on a level in a reasonable test period.

If our contention be sound, as we believe it is, from numerous authorities decided by this Court, then it is immaterial when the refund provision be made to attach and become operative—provided only it does not appropriate past earnings to justify actual present and future confiscation. The refund provision may as justly attach when the revenues happen to be below the average, as when they happen to be above the average—for the fluctuations are in their nature a self-levelling process, and will work out on the average above the level of confiscation in any event.

What the Company is really attempting to do is to claim the benefit of all fluctuations of revenue above the average, and escape the correlative obligation of accepting the fluctuations below the average. Put differently, under the Company's theory, it should be permitted to accept the super-average earnings, but increase its price every time the revenues drop to sub-average levels because of depression, hot weather, extraordinary operating expenditures, or any other causes.

If, considering the fluctuations likely to occur in the future, the 55c rate is on the average non-confiscatory in its operation prospectively from the date of the order (June 13, 1933), then it must follow that it would likewise be non-confiscatory in its operation retroactively, considering such fluctuations in the average computation, for the period of the refunds, Jan-

uary 1, 1932, to June 13, 1933. *Galveston Elec. Co. v. Galveston*, 258 U. S. 388, 400, 401, 403; 66 L. Ed. 678, 685, 686; *Ill. Cent. Ry. Co. v. Best*, 39 Fed. (2d) 658, 660 (three-judge court); and other cases cited under Point XVIII, supra, pp. 27-28.

The making of reparations for past overcharges is not a violation of the due process clause of the Federal constitution. *L. & N. Ry. Co. v. Finn*, 235 U.S. 601, 608-610; 59 L. Ed. 379; *Baer Bros. Merc. Co. v. D. & R. G. Ry. Co.*, 233 U. S. 479, 486; 58 L. Ed. 1055.

The Company contends that the refunds ordered by the Commission are retroactive in effect, and that it did not lie within the power of the Commission to make its order effective at a period prior to its date of entry, June 13, 1933. While this presents primarily a question of State law which has been determined adversely to the Company by the Court of Civil Appeals, as to the statutory power of the Commission to order refunds,[19] we are bringing the matter to the Court's attention here only in connection with the Company's

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[19]The Company's appeal from the city ordinance to the Commission did not have the effect of nullifying the 40c ordinance rate, but only of suspending its operation until the Commission should determine, (in the appellate action, in the nature of a review, as distinguished from a proceeding of original jurisdiction), what rate would be reasonable, and should by its order modify and make effectual the ordinance rate as of its original effective date, January 1, 1932. See Company's pleading, R. I, 32, alleging suspension of the ordinance rate. See also Article 6058, quoted in footnote 5, supra, p. 11; and Judge Blair's opinion, R. I, 426-428.

claim of confiscation through the refunds ordered for the year 1932 and to June 13, 1933.

In urging this proposition, the Company fails to bear in mind that these proceedings did not originate before the Commission, but had their inception in the passage of the City ordinance, December 15, 1931,[20] and that when it perfected its appeal to the Commission from the City ordinance, it voluntarily executed its appeal bond, expressly conditioned that it would:

> "Refund and pay to the City of Laredo for the benefit of the consumers in said City any excess of rates or charges collected by the principal, Texas Border Gas Company, over and above the rates and charges that shall be finally determined to be a fair and reasonable return upon the value of its property used and useful in supplying natural gas and natural gas service to the City of Laredo." (R. I, 59-60).

If the position taken by the Company on this point were correct, the conditions of its said bond, given on appeal to the Commission, would become meaningless, and could never be fulfilled. It was necessarily within the contemplation of the Company when it executed such bond, that the time of the promulgation of the Commission's order would be at a date *subsequent to* January 1, 1932, the effective date of the ordinance and of the appeal to the Commission.

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[20]The ordinance, by its terms, became effective January 1, 1932 (R. I, 26). Prior to that date (December 23, 1931, R. I, 60, 32) the Commission had, by virtue of the Company's appeal, already acquired jurisdiction of the parties and subject-matter. Pac. Coast Elev. Co. v. Dept. Pub. Works, 130 Wash. 620, 228 Pac. 1022, 1029.

XXVI.

(See pp. 34-43, supra).

It will be impossible, in a brief of reasonable length, to review in detail all of the evidence bearing upon the numerous points of controversy as stated in Paragraph XXVI of the Summary. Where further statement, record references and argument seem desirable, we shall set them forth; otherwise, we shall give only the record references bearing upon the particular point, in order that this Court may refer readily to all of the pertinent evidence, and determine whether or not it is sufficiently clear and convincing to show confiscation with that degree of certainty required by the previous decisions of this Court. See *B. & O. R. Co. vs. United States*, 298 U. S. 349, 372-373; 80 L. Ed. 1211, 1226, and cases there cited in footnote 33.

A. RATE BASE:

XXVI-A, 1, 2 AND 3.

(See p. 34, supra).

These points raise the question whether the Pescadito-Jennings transmission line and the east and west Jennings gathering systems were shown to be necessarily used and useful in serving Laredo. And, of course, if the Pescadito-Jennings line itself were not used and useful, it would necessarily follow that neither the east and west Jennings gathering system, nor the tie-in line between Jim Hogg Field and Jennings (on which the Company had been charging up "pipe line rentals" claimed to have been incurred and

due its affiliated concern, Southern Gas Company, as hereinafter discussed in detail) could have been used and useful; for it was only through Pescadito-Jennings line that any of the other properties could have served Laredo.

The Company (Brief, pp. 10-11) claims that this Pescadito-Jennings line was taken out of service in 1931 only temporarily for repairing leaks in two principal "hot spots." If this were true, however, it does not explain why the Company delayed starting the repair on the "leaks" until June, 1933, (R. II, 780) nor why, instead of being a matter only of repairing a few leaks it turned into a major job (R. II, 1103) of reconditioning and replacing practically the whole of the line, as shown more in detail hereinafter.

Incidentally, if Pescadito-Jennings line were to serve as a standby line to serve Laredo when other lines broke down, there is this fatal obstacle to the theory: There are 14 miles of main pipe line between Aguilares Junction and Laredo, which is the sole transmission line leading into Laredo (R. II, 1405, map or appendix, this Brief); and if a breakdown should occur in that 14-mile section, the town would be out of gas regardless of Pescadito-Jennings line's condition as standby equipment.

The Company does not even claim that Pescadito-Jennings line was used at any time during 1931, 1932, or until the fall of 1933, except for one day of "emergency service," which it claims occurred on March 13, 1932. (R. I, 231). This circumstance rested solely upon the testimony of Abernathy, Superintendent of Transmission operations, who had his

headquarters in Houston; and his testimony, besides being subject to the usual possibilities of error through defections of memory, etc., was totally unsupported as to the claimed date, by documentary or other evidence which would definitely and reliably fix the date. As against Abernathy's said testimony, the Commission's accountant, Lewis, examined all of the vouchers covering gas deliveries from the Jennings field to the Pescadito-Jennings line for the year ending July 31, 1932, and found no voucher covering any deliveries in March, 1932. (R. II, 886-888). In fact, he found only one voucher for the entire 12-months' period—showing one delivery on one day, and that was in August, 1931, (R. II, 1316-1317). This was apparently the one day of "emergency service" which the Company claimed had occurred on the convenient date of March 13, 1932, when there would probably have been cold weather and uninterrupted service would have been particularly important.

With respect to east and west Jennings gathering systems, the Company's own Engineer, Worsley, in writing to the City's Engineer, Neff, soon after the inception of this rate controversy, (October 7, 1931), stated (R. II, 1054) that his appraisal did not include any gathering lines. When confronted with this fact, Greene, another of the Company's engineers, who prepared its appraisal and testified before the Commission and District Court, called Worsley's effort a "horseback appraisal" (R. I, 684-685), although he testified Worsley was still in the employ of the Company as an engineer.

Before the Commission, (October and November, 1932) the Company gave not the slightest intimation

that it then entertained any intention of repairing or reconditioning the Pescadito-Jennings line. This line was originally built in 1916, (R. I, 225, 623, 216-A; R. II, 1405). The rate controversy between Company and City had its inception prior to February, 1931, (R. I, 216-A; R. II, 1280-1283, 1404, map). The line, in 1931 and 1932 was in such bad condition that it was wholly unserviceable.

Both Elrod and Shaw, engineers for the City, inspected this line in 1932, prior to the Commission hearings; and Elrod again inspected it in the early months of 1934, after the Commission hearings and after its reconditioning of 1933, but before the District Court trial. Shaw had been in the employ of the Company, and had many years of experience in constructing and maintaining gas transmission lines, (R. II, 1260-1263). Both testified that it was unfit for use before the reconditioning, and Elrod said that it still was after the reconditioning. (R. II, 1264-1266, 1001-1004, 1277-1280).

The testimony of the City before the Commission showed that the line was "porous like a sieve, full of holes", (Elrod, R. II, 1277; Shaw, R.II, 1265-1266).

Because of its bad condition, and of the fact that it had been used only once in the two years preceding the Commission's hearings, the Commission found (R. I, 16, 19, 24-25) that neither the Pescadito-Jennings line nor the east or west Jennings gathering systems were used or useful or necessary in the Laredo service, and that the line was not adequately protected with enamel or other coating; but, nevertheless it included the line and the west Jennings gathering system in the rate base.

Not even the Company's witnesses would testify that the line was used very much (see Abernathy, Superintendent of Transmission, R. I, 652, 653).

After the Commission promulgated its opinion and order of June 13, 1933, including the Pescadito-Jennings line in the rate base but finding that it was not used, useful or necessary, the Company began what was purely a build-up for the purpose of having the line included and held used and useful in the District Court trial then in imminent prospect. In the month of June, 1933, immediately following the Commission's order, the Company for the first time launched actively into its actual program of reconditioning the Pescadito-Jennings line, which it claims it had intended to do since the beginning of 1931. From June until the fall of 1933 it expended in excess of $33,000.00 in reconditioning and replacing sections of this line (R. II, 879, 780). Hargrove, who had been with the Company since January, 1928, and who was Vice-President in charge of transmission operations, testified (R. II, 1103) that this was the first repair work of any major importance ever done on this line since its original construction in 1916. The line was put back into partial operation in the fall of 1933, purportedly as standby equipment.

Even after this partial reconditioning, and in the early part of 1934 before the District Court trial, Commission's Engineer Elrod again inspected this line from end to end, and made detailed notes of its condition from pole to pole and from mile post to mile post; and its condition as then found by him is shown at R. II, 907-914. At R. II, 909, Mr. Elrod says "there was

one big leak that was whistling so that it could be heard for several pole lengths down the line." At R. II, 1001, he states that although gas was flowing in the line in the direction of Laredo, it was "leaking very badly." And at many other locations he noted bad leaks and bad conditions generally. Even the Company's witnesses recognized its still-existing bad condition, and said that they planned to do further extensive reconditioning, and thought that after completing the rehabilitation it would be in "very satisfactory working condition", (R. II, 1100), where Hargrove says it was in "bad condition" and "it was necessary to put new pipe in and recondition some sections of the old pipe and replace it."

Elrod's above mentioned detailed report of his last examination of the line, foot by foot, was admitted over the strenuous objection of the Company, (R. II, 911-912).

Even accepting the Company's claims at face value, of its intention of using this line at some indefinite time in the future to serve gas to Laredo from the Jennings and Martinez (Fansler) Fields, if and when that might become necessary, we think that in the most favorable light it shows only that at present and for an indefinite period in the future the line can be considered only useful upon remote and indefinite contingencies for rare emergency use as standby equipment; that even this use is not necessary; and, as pointed out by the Commission's opinion, the value of the line for such standby use has not been shown. Viewed in a less favorable light, we think the evidence shows only a vain attempt to get the line included in the rate base when there is no real necessity for it.

Both Lewis, Commission's accountant (R. II, 1317), and Abernathy, Company's Superintendent of Transmission (R. I, 652), testified that there were ample reserves of gas in the Carolina-Texas Field to meet all requirements at the present time of the entire Laredo area. See also, the open flow capacity of the wells in Carolina-Texas Field, R. I, 654.

Furthermore, the Company's witnesses testified that the checkered tie-in line between the Cole-Bruni Fields and the Carolina-Texas Field, while now being used to transport gas out of the latter field northward to San Antonio and other areas, was intended later to supply gas to Laredo from the tremendous reserves in Cole-Bruni Fields if necessary in the future. (Stein, R. I, 227, 228; Ivy, R. I, 355, 358; Greene, R. II, 1221; Stein, R. II, 1337).

The several large lines leading out of the area all tap the Carolina-Texas or Cole-Bruni fields. Information about these lines is given as follows: Ivy, R. I, 357-359; Abernathy, R. I, 653-656; Biddison, R. I, 707; Ivy, R. II, 1097-1098; Greene, R. II, 1222. Biddison, R. I, 707-708, admitted that these large lines, with their enormous investment, would not have been built unless the investors "knew or thought they knew there was a permanent supply of gas in that area." At R. II, 1099, the Company's Geologist, Ivy, admitted that there was much undeveloped gas reserve territory in the immediate vicinity. And the record reflects the experience of the Company that frequently when it began to appear that particular fields in the Laredo area were about to become exhausted, new strata or producing horizons would be

discovered in the same fields which would put them back into the class of large producers.

We think certainly the evidence is ample to show that the gas reserves in the Carolina-Texas and Cole-Bruni Fields are quite sufficient to supply the needs of Laredo and its surrounding markets at the present and for many years to come, without resorting to use of the Pescadito-Jennings line and the two Jennings gathering systems.

Even if it be granted (which it is not) that the Pescadito-Jennings line and east and west Jennings gathering systems are to any extent necessarily used and useful in service of Laredo, yet the evidence shows plainly that the Jennings Field wells and gathering systems are used almost exclusively for delivering gas into the Jennings-Roma line for delivery into Mexico; and it is shown that approximately four miles of the Pescadito-Jennings line at the southern end thereof is used exclusively for such deliveries. (R. I, 557, 569-570; R. II, 1321).

It is shown that the Company owns the largest well in the Jennings Field—Jennings Well No. 10—R. I, 557, 569-570. The Company made total deliveries from the Jennings Field into the Jennings-Roma line destined for Monterrey and other points in Mexico, totalling 1,806,640 MCF for the year ending December 31, 1933, R. II, 777. The number of wells in the field is shown at R. II, 1218-1219, and the location of these wells at R. II, 1324-1325. It is shown by the testimony of Abernathy, R. I, 650, that all of the gas purchased at 3c per MCF by the Company in the Martinez (Fansler) Field goes to Mexico.

XXVI-A, 4

(See p. 34, supra)

The Company's witnesses included in their appraisal 7.16 miles of transmission line extending eastward from Aguilares Junction to Mirando City and Oilton. A mere glance at the map (R. II, 1405 or Appendix to this Brief) will show conclusively that this branch of the pipe line system could not possibly be used or useful to any extent in serving Laredo. Greene testified that no gas had flowed through this line toward Laredo for several years (R. I, 678-679; R. II, 1209-1211). While the Company's witnesses did not allocate this line 100% to the service of Laredo, yet it did enter into their allocation and to this extent the rate base was unwarrantedly inflated.

XXVI-A, 5

(See p. 34, supra)

On October 21, 1932, the entire properties of the then existing Texas Border Gas Company and South Texas Gas Company were transferred to United Gas Public Service Company,[21] which transfer is reflected

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[21]The transfer was made in the interim adjournment between the two hearings by the Railroad Commission. The City and Commission, and their witnesses, did not learn of the voucher entry until the Commission's Accountant Lewis, after entry of the Commission's order of June 13, 1933, made his supplemental audit of the Company's books to bring it down to December 31, 1933, for use in the District Court trial. The Commission, therefore, did not have this information available at the time it fixed fair value for the purpose of the

on the Company's books and is evidenced there by a voucher entry as of that date,[22] reciting "to record acquisition of properties, assets and assumption of liabilities of South Texas Gas Company under agreement dated October 21, 1932" (R. I, 732); the properties so conveyed included not only those used and useful in serving Laredo, but all the Company's additional properties, embracing the Roma-Jennings transmission line completed in the year 1929, and the distribution systems serving the six other towns named at R. II, 766. The cost of the Roma-Jennings line alone had previously been set up on the Company's books at $848, 232.98, (R. I, 732).

The Commission's Accountant, Lewis, when questioned as to the source from which he obtained the voucher and the purported effect of that voucher entry on the Company's books, stated that upon making

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21 (Cont'd)
order. The entire transaction was, at the time of the District Court trial, fresh in the minds of those connected with the Company who had knowledge of the entire transaction. None of such witnesses was produced by the Company, nor were any of the supporting books and records produced. At pp. 8-9 of the Company's Brief, it attempted to explain away and dismiss the whole matter in ten lines by saying that the transfer involved cancellation of outstanding stocks, bonds and securities, based entirely upon the opinion and conclusion of the witness Phillips.

[22]Reflecting a book value of $934,798.02, from which should be deducted accrued depreciation, as shown on the books, of $78,632.20, (R. I, 733).

inquiry of those in charge of the Company's Accounting and Construction Departments he was definitely advised that the said sum of $934,798.02 represented the total *value* at which those properties were taken over (R. II, 837); and that the transcript of the fixed capital account of the Company, furnished to him by the Accounting Department, was intended to and did reflect the said entire transaction and the manner in which the Company treated it on its books. Lewis further testified that in response to his request for complete and detailed information as to the nature and character of the transfer of properties, he was advised that the aforementioned voucher and transcript were the only instruments and information that could be furnished him purporting to set forth the entire details of such transfer (R. II, 840). Upon inquiring further as to his difficulty in making a "reconcilement between the figures" of the South Texas Gas Company and Texas Border Gas Company, and those of the United Gas Public Service Company, he was advised by the Accounting Department and their Chief Accountant Womack "that such reconcilement was not available" (R. II, 840-841).

The Company thereupon launched a vigorous attack on Lewis as to his interpretation of the voucher entry reflecting the sum of $934,798.02 as the total value of the properties so acquired and in that connection employed for that specific purpose an Accountant, Phillips, who previously had had no connection with the Company and was entirely unfamiliar with the Company's books and records, having had occasion to examine such records for a period of unstated duration, only a week or ten days

prior to the time that he was called upon by them to give his testimony (R. II, 1108). Although promising to produce the original voucher (R. II, 841) the Company failed to do so; and although its Chief Accountant Womack, who was thoroughly familiar with the Company's books and records, and from whom Lewis received the detailed information relative to the voucher entry, was available during the entire time of the trial, he was never called upon by the Company to take the witness stand and change, modify or explain away, if he could, the factual information he had furnished Lewis and the interpretation of the voucher entry that Lewis had given, based upon such information.

The Company, instead of using its Chief Accountant Womack, or some other Company witness who was, or was presumed to be, thoroughly familiar with the entire transaction, to explain it or produce record entries doing so, was relying merely upon its attempt to have the witness, Phillips, from his superficial examination of the voucher and of the records in connection with it, state merely his opinion and conclusion as to what the voucher reflects. Upon the Commission's objections to such testimony from Phillips, upon the ground that the voucher and other Company records were the best evidence, the Court sustained the Commission's objections (R. II, 1107) and thereafter the Company made no further attempt to produce the voucher itself or any other record or testimony explaining it.

This failure or omission on the part of the Company leaves its evidence upon this point fatally de-

ficient so far as concerns meeting the burden of proving by clear and satisfactory evidence that this voucher does not truly reflect the valuation for capital account placed upon the total properties as transferred of $934,798.02 on the Company's books; which, as before pointed out, embraces the Roma-Jennings line and other lines and properties not used and useful in serving Laredo, as well as distribution systems in six other towns (Footnote 1, p. 7, supra; R. II, 766). See *Great Northern R. Co. vs. Washington,* ..... U. S. .....; 81 L. Ed. ..... (Advance Op. No. 7, p. 350 No. 20—October Term, 1936—Dissenting opinion, p. 361); *Kings County Lighting Co. vs. Lewis* (N. Y. Sup. Ct.) 110 Misc. 204, 180 N.Y. Supp. 570, 584.

In *San Diego L. & T. Co. vs. Jasper,* 189 U. S. 439, 443-444; 47 L. Ed. 892, 895; *Great Falls Gas Company vs. Public Service Comm.,* 34 Fed. (2d) 297, 299; and *Fort Worth Gas Co. vs. City of Fort Worth,* 35 Fed. (2d) 743, 747, it is held that a public utility's tax rendition statements are admissible against it as bearing upon the values of its properties in rate cases, when such statements are made by its authorized officials. By plain analogy the Company's voucher entry in this instance likewise possesses the same strong probative force—especially when unexplained as here.

XXVI-A, 6, 7, 8, 9, 10

(See p. 35, supra)

These items include the five undistributed overheads and cash working capital. The estimates for the Company were made primarily by the Company's En-

gineer Greene. To bolster up his estimates, the Company employed the professional witness, Biddison. Although the Company (Brief, p. 41) attempted to make it appear that this witness was a novice in testifying for utilities in rate cases, the record reveals that he was, and had been, employed almost exclusively by utilities, for over 25 years, and had never testified for any but public utilities (R. II, 1223-1224, R. I, 666-667, 709-710), was under annual retainer by the Lone Star Gas Company's system at the time, and was hired at a salary of $100.00 per day, plus expenses, to testify for the Company in this case. His testimony, in upshot, was that he had examined the appraisal prepared by the Company's Engineer and that it met with his blanket approval.

We need not detail the evidence upon these points, but shall only give the record references, so that the Court may examine them and see whether the Company's evidence was sufficiently clear and satisfactory to establish confiscation.

6. Premliminary and Organization: (Commission's findings) R. I, 21; (Biddison) R. I, 184-191; (Elrod) R. I, 203-214, 330; R. II, 900-907, 924-928, 1249-1254.

7. Administrative and Legal: (Commission's findings) R. I, 21; (Biddison) R. I, 184-191; (Elrod) R. I, 203-214, 330; R. II, 900-907, 924-928, 1249-1254.

8. Interest during Construction: (Commission's findings) R. I, 21; (Biddison) R. I, 184-191; (Elrod) R. I, 203-214, 330; R. II, 900-907, 924-928, 1249-1254.

9. Taxes during Construction: (Commission's findings) R. I, 21; (Biddison) R. I, 184-191; (Elrod) R. I, 203-214, 330; R. II, 900-907, 924-928, 1249-1254; (Exhibit showing taxes actually paid by Company two years following construction of plant, 1911-1912) R. II, 1372-1373.

10. Engineering and Supervision: (Commission's findings) R. I, 21; (Biddison) R. I, 184-191; (Elrod) R. I, 203-214, 330; R. II, 900-907, 916-921, 924-928, 1088, 1249-1254.

13. Cash Working Capital: (Commission's findings) R. I, 16; (Biddison) R. I, 184-191; (Elrod) R. I, 203-214, 318-320, 330; R. II, 900-907, 1009-1013, 1249-1255.

With reference to all of the five undistributed overheads, see the exhibit setting forth the elaborate thesis and set-up of the Company's Engineer Greene, R. I, 159-166.

Here, as usual, the utility has estimated overheads greatly in excess of those historically incurred, as testified by Elrod, or which would be incurred in event of reproduction. See *United Fuel Gas Co. vs. Public Ut. Com.*, 14 Fed. (2d) 209, 214, Aff. 278 U. S. 322, 73 L. Ed. 402.

XXVI-A. 11

(See p. 35, supra)

Going concern value: In its exhibit before the Commission, the Company computed the several amounts separately that it claimed inhered respectively in the distribution, transmission and the gathering sys-

tem properties (R. II, 1230-1232, 1233-1235, 1342-1350) for a total of $187,784.00, (R. II, 1348-1349); the amount was later reduced in the testimony to $155,082 (R. II, 1231, R. I, 18); the cost of attaching business was considered by it as a substantial item embraced in said total, but when the Company's witness, Strange, was interrogated about his opinion as to "the cost or expense to the South Texas Gas Company" (transmission company) of attaching its business, he replied that he could not and would not attempt to estimate it; (R. II, 1234). Obviously there could be no cost incurred in attaching business to the South Texas Gas Company (transmission line) or to any of the gathering systems, as their only customer was their affiliate distributor, the Texas Border Gas Company. In this connection it is of particular interest to note that the amount the Company originally claimed for its transmission system is set at $99,115.00, whereas that set for the distribution system is considerably less, namely, the sum of $84,290.00 (R. II, 1348). Strange was interrogated as to this point while testifying before the Commission, and admitted that most of the cost of attaching business, concerning which he had previously testified at length, would be incurred by Texas Border Gas Company, the distributing company (R. II, 1235).

Before the District Court, the Company made a complete change of its computation, and set forth its estimate in a lump sum, distributing it to the property overall, and without segregating it between the gathering, transmission and distribution systems. It also reduced its estimate from $155,082.00 to $120,000.00 (R. I, 176-178).

The Company's hired expert, Biddison, both before the Commission and the District Court, although having no knowledge whatsoever of the history of the Company, (R. I, 676, 673-677) attempted to support the said estimates of the Company's witness Greene *in toto*.

The Company, from the very outset of this proceeding before the Commission, and continuing throughout the trial in the District Court, persistently and consistently objected to the introduction or consideration of any evidence pertaining to the past history of the Company, which this Court has repeatedly held is an essential factor in determining whether going concern value inheres in the property and if so, in what amount. *Houston vs. S. W. Bell Tel. Co.*, 259 U. S. 318, 325,[23] 66 L. Ed. 961, 965; (R. II, 1272, before the Commission; R. II, 745, 749-750, 763, 881, 1057). The history is equally important and enlightening upon all other phases of the case.

There was controversy between the parties, both before the Commission and Court, as to whether it was necessary that a separate sum be allowed for going concern value, as contended for by the Company, or whether it was sufficient, as contended by the Commission and as done by the Commission's witness Elrod, to make no separate allowance for going concern value as such, but to include the going concern value in valu-

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[23]Page 325: "Whether going concern value should be considered and allowed at all in determining the base for rate-making, and, if allowed, what the amount of it should be, depends upon the financial history of the Company."

ing the component parts of the physical property as parts of a going concern, with personnel trained and existing business attached, and allow full overhead expenses and other intangible values. See *Los Angeles G. & E. Corp. vs. RR. Comm. of Calif.*, 289 U. S. 287, 302-303, 313-319; 77 L. Ed. 1180, 1191, 1196-1200, and cases there reviewed. See also *St. Joseph Stock Yards Co. vs. United States*, 298 U. S. 38, 62-64; 80 L. Ed. 1033, 1047-1048.

The Commission acted upon the latter plan. (R. I, 17, 18, 24).

The Company endeavors to make it appear that the Commission's Engineer, Elrod, did not include any value for going concern at all, and with a view of making this appearance, has set forth in the record clipped excisions from his testimony (R. I, 214, 313). A reading of the following record references, however, will show how those excerpts read in connection with their full context; and, in that light, they exhibit quite a different picture. These record references make it plain that Mr. Elrod made full and ample allowance for the element of going concern value though not as a separate lump sum allowance, but in valuing the component parts of the property as elements of an active, going concern, with personnel trained, existing business fully attached, and with ample allowance for all overheads and other intangible values: (R. II, 907, 915-916, 1016-1017, 1256-1259, 1268, 899, 1025-1033). At R. II, 1025, Mr. Elrod explains that he had misunderstood the Company's counsel in giving his previous testimony, quoted by the Company at R. I, 214, 313.

XXVI-A, 12

(See p. 35, supra)

Accrued Depreciation: The Commission found the over-all properties to be in 78% condition of new, (R. I, 18-19). In the light of the evidence, we think this was over-liberal. The Commission included in the rate base the Pescadito-Jennings transmission line, and we have already been at some pains to detail the dilapidated condition of this line which rendered it unserviceable, even after the expenditure of more than $33,000 in rehabilitation in 1933. The Company, in estimating the amount it claimed necessary to accrue to the depreciation reserve for the future, (5% on distribution, 6% on transmission, and 10% on gathering systems, R. I. 708), took into consideration the loss in service value resulting not only from physical deterioration but from inadequacy, obsolescence, public requirements, and all other non-physical causes; but in arriving at the purported per cent condition of the property (see appraisals of Company's engineer, Greene, R. I, 151-152, 174-175), it used only "observed depreciation" or physical deterioration which was palpable to the eye. It gave no effect in accrued depreciation to the age-life method at all; and obviously, it is impossible to "observe" even all of the physical deterioration by such casual inspection methods as the Company used. (Biddison, R. I, 366-367; Shaw, R. II, 1265).

In contrast, Elrod, gave effect to a combination of the observation method modified by a reasonable application of the age-life method, (R. II, 929-938, 989-1009, 1247-1249).

It is also interesting to compare the amount of the unexpended balance in the depreciation reserve fund, which the Company had actually accumulated, with the amount of accrued depreciation as found by the Commission and as claimed by the Company. Theoretically, of course, the unexpended reserve fund should equal the accrued depreciation in the property, if a proper balance is maintained in the relation of the two items. As of October 21, 1932, when the United Gas Public Service Company acquired the properties from South Texas Gas Company and Texas Border Gas Company, the books then showed a reserve accumulation of $499,707.47 (R. I, 238. 241). It is strongly probable that the actual accumulation exceeded the above figure; as Lewis, Commission accountant, testified (R. I, 244) that it was impossible to ascertain the true balance, for there had been several mergers and each time the accumulation was "wiped out and they started over."

XXVI-A, 13

(See p. 35, supra)

Cash Working Capital: The Commission allowed as cash working capital the usual 45 days' operating expense, plus gas purchases. It is usual to eliminate gas purchases from cash working capital, because the monthly remittances, especially under a continuous meter reading and billing program, such as the Company used in Laredo, reach the Company from the customers in sufficient time and amounts to pay for its gas purchases before they are billed to it; and this reason applies with especial force where as here, the distributor is purchasing its gas from an affiliated pipe

line company and where the Company, as here, obtains a large portion of its gas from its own wells or other affiliates.

Record references: (Elrod), R. II, 1009-1013, 1255).

RATE BASE IN GENERAL.

The Company, at pages 40, 43, 59 of its Brief, launches an acrimonious attack upon the qualifications, credibility and soundness of the methods of approach of the Commission's witness, Elrod, who, it says, was the only engineering witness testifying for the Commission. We refer the Court to the testimony of the Commission's other engineering witness, J. D. Shaw. As will appear from his qualifications (R. II, 1260-1263), Mr. Shaw was a thoroughly experienced, seasoned, and qualified engineer who had for many years been engaged actively in the business of building, constructing, and supervising natural gas properties and had been in the employ of the Company itself for several years. He, together with Engineer Elrod, prepared the engineering appraisal which was presented on behalf of the City before the Commission, (R. II, 1264). Mr. Shaw also made an actual inspection of the Pescadito-Jennings transmission line, (R. II, 1265-1266), and testified that it was not in serviceable condition, and he did not see how the Company could use it. Naturally, Mr. Shaw and Mr. Elrod, having jointly prepared the City's appraisal, were in accord upon all items entering into it.

Furthermore, while, as we have pointed out under Point XI (supra, p. 22), the Company does not prove

its case of confiscation by attacking the evidence of the opposing party, yet we cannot permit to go unchallenged the Company's unwarranted attack upon Mr. Elrod's qualifications and methods of approach. His qualifications are outlined at R. II, 1241-1244; and from that statement, the Court will perceive not only that Mr. Elrod possesses unusually high qualifications as an engineer, but that his testimony has been considered by this Court, and favorably upheld, in more than one rate case—the Galveston Electric Company Case, and the Brush Electric Case. His general methods of approach are outlined in R. II, 1266-1269, 921-924, and 980-1013.

At R. II, 1244-1245, 1260 and 1276, Mr. Elrod explains why engineers employed by municipalities to give valuation testimony in rate cases find it virtually impossible to obtain from manufacturers, jobbers, and contractors, the true and lowest figures at which the property could actually be constructed, the reason being in substance that it is always known that the estimates are desired only for valuation purposes and not actual construction, hence the informant has no incentive to give the greatest discounts and lowest bids as he would do if he had a real hope of obtaining the order for the work; and at the same time, they are reluctant to give estimates which are adverse to the very people who would be potential and prospective purchasers or employers if actual construction should be undertaken.

The Company claimed that there was not sufficient data in existence upon which to arrive at a reliable estimate of historical cost; that the early records of the

Company were not complete and accurate; and that not all of the overheads had been capitalized. (R. I, 99). It therefore relied solely upon reproduction cost new, less observed depreciation, as the sole measure by which to arrive at fair value—and objected strenuously and repeatedly to all evidence of an historical nature pertaining to any phase of the Company's properties and business, for any purpose, or as applied to any phase of the case; these objections reaching not merely the earlier periods when it claimed the records were not reliable, but extending to all years prior to the year ending July 31, 1932, before the Commission, and prior to 1932 before the courts; R. I, 736, R. II, 745, 749-750, 763, 881, 1272; and many others.

Notwithstanding such attitude on its part, it plead (R. I, 39) that the historical cost of the property exceeded $1,200,000; and from Par. F, R. I, 34, it appears that this means only the property used and useful in serving Laredo. This would leave the inference that the Company had segregated that property within the Laredo area used and useful in serving Laredo from that which was not—an inference which, as we shall later make plainer, was totally unfounded.

When Womack was asked why the Company had pleaded $1,200,000 historical cost, he replied he had never seen that figure before, that it was a ledger figure but did not include all values properly capitalizable, R. I, 99. Although pleading historical cost, the Company offered no evidence of historical cost at all, either segregated or unsegregated.

The Commission's accounting witnesses, however, assuming a burden that was the Company's and not

the City's or Commission's, compiled exhibits showing as accurately as the books and records reflected, the total historical cost of all the Company's property which the United Gas Public Service Company acquired from Border Gas Company, South Texas Gas Company, and Texas Border Gas Company. That before the Commission (R. II, 1374A) extended to July 31, 1932, and that before the District Court, (R. I, 237-238A), supplemented the property by net additions to December 31, 1933. Both exhibits show the properties unsegregated as between those which were and were not used and useful to Laredo. The exhibits went in over the Company's vigorous protest, as did all historical data. (R. II, 1272, R. I, 736).

The starting point for these exhibits was the actual inventory of the physical properties of the original Border Gas Company, made at the beginning of that company's operations, supplied by the Company to the City's accountant Kinney, and used by the Company for many years as the basis for adjusting its federal income tax accounts with the Internal Revenue Department. The starting figure was $166,966.68, which figure was arrived at by crediting the total investment of $179,101.10 (R. II, 740) with materials and supplies amounting to $12,104.42, which latter figure found its support in actual journal vouchers, on which the Company was computing its depreciation, R. II, 742, 743.

The Company points out, p. 39 of its Brief, that the Commission has not made any segregation of the property used and useful in the Laredo service in connection with these historical cost exhibits, and argues

that the burden was upon the City and Commission to do so, although it admits (same page) that "the unit for rate making purposes was the area within the corporate boundaries of Laredo." A short and complete answer to that is, that the duty did not devolve upon the City or Commission to make such a segregation, but rested rather upon the Company, and has not been discharged: *Norfolk & W. R. Co. v. North Carolina*, 297 U. S. 682, 689-690;[24] 80 L. Ed. 977, 982-983; *Great Northern R. Co. v. Weeks*, 297 U.S. 135, 143-145; 80 L. Ed. 532, 538-539; *Smyth vs. Ames*, 169 U. S. 466, 541, 42 L. Ed. 819, 847; *Simpson vs. Shepard* (Minnesota Rate Cases), 230 U. S. 352, 465-466, 57 L. Ed. 1511, 1568; *Smith vs. Ill. Bell Tel. Co.*, 282 U. S. 133, 148-149, 75 L. Ed. 255, 263.

The City, Commission and Court were entitled to all the light that could be thrown upon the questions before them; and the burden rested upon the Company to furnish that information: *Norfolk & W. R. Co. vs. North Carolina*, 297 U.S. 682, 689-690;[25] 80

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[24]P. 689: "All this becomes the plainer when we recall that the State in presenting computations did not lift the burden from the railway of satisfying the court, after all the evidence was in, that it was a victim of oppression. If different or supplementary computations were needful to that end, the railway, not the State, was under a duty to submit them."

[25]See quotation in footnote 24, supra.

L. Ed. 977, 982-983; *Knoxville vs. Knoxville Water Co.*, 212 U. S. 1, 18;[26] 53 L. Ed. 371, 382.

If the Company had discharged its burden of showing historical cost to the best of its ability, and of segregating the Laredo used-and-useful property from the remainder, this would have given the public authorities an additional element well worth taking into consideration in arriving at fair value. If the Company had sustained its burden of segregating the properties, then whether fair value had been viewed in the light of segregated historical cost or segregated value on the basis of its $934,798.02 voucher entry valuation for capital account on its books, the resultant fair value would have been even lower than the $700,000.00 reproduction cost new estimate submitted by Elrod—and doubtless it was the realization of this fact that motivated the Company in making no attempt at giving historical cost or making a segregation.

B—OPERATING EXPENSES:

XXVI-B, 1

(See p. 35, supra)

1c Gathering Charge, Carolina-Texas Field: When the Company completed construction of the Jennings-Roma transmission line late in 1929, (R. I, 227,

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[26]P. 18: "The city authorities acted in good faith, and they tried, without success, to obtain from the company a statement of its property, capitalization, and earnings . . . . the companies to be regulated will find it to their lasting interest to furnish freely the information upon which a just regulation can be based." See R. II, 1353-1355.

R.II, 749, 1318-1319), the South Texas Gas Company began taking heavy withdrawals from the Jennings field destined for Monterrey, Mexico, through the Jennings-Roma line. R. II, 872, 778-779, 1218-1219. This resulted in lessening the amount of gas from the Jennings field available for Laredo and necessitated the taking of a corresponding amount for Laredo from the Carolina-Texas field.

On November 1st, 1929, (R. II, 1366-1369), South Texas Gas Company entered into a contract with its affiliate producer, Southern Gas Company, to purchase from it gas from the Carolina-Texas field at the rate of 5c per MCF, and in addition, to pay a gathering charge of 1c per MCF, purportedly for use of the Southern Gas Company's gathering system in the Carolina-Texas field. Prior to that time gas had been purchased in that field by South Texas Gas Company from Southern Gas Company without payment of any gathering charge.

See also Abernathy's statement that this is the only gathering line charge ever made by the company, (R. II, 1340).

It is evident that if there were any necessity for the gathering charge in 1929, that necessity was brought about by the completion of the Jennings-Roma line, so that any increased cost of gathering gas was due to the new demands for gas to be transported into Mexico; and the city of Laredo should not be penalized to the extent of 1c per MCF, or any other amount, simply because South Texas Gas Company needed the gas for other markets, (R. II, 871, 872).

Furthermore, although South Texas Gas Company had on April 9, 1928, acquired from Border Gas Company title to certain gathering system properties in Carolina-Texas field, (R. II, 1134-1136), the Company did not include those gathering system properties in its appraisal at all. This omission was apparently made deliberately in order that the Company might more plausibly bolster up its claim to the 1c gathering charge, (R. II, 1220).

The Commission, (R.I, 23), approved the gathering charge as to propriety, but after taking into consideration all available data in connection with it, allowed only ½ c per MCF gathering charge. Under the record, we think the charge should be totally eliminated. See Lewis, R. II, 757-761, 871-872, 1318-1321.

XXVI-B, 2

(See p. 35, supra)

We have attempted to demonstrate that the Pescadito-Jennings line should be excluded from the rate base entirely, and if this is done, it necessarily follows that east and west Jennings gathering systems must likewise be excluded.

Under no theory could the East Jennings gathering system be considered used and useful to [illegible]edo. It is typical of the Company's methods in [illegible]eral, however, that it has included in its valuations, besides the Pescadito-Jennings line, both the east and west Jennings gathering systems, prorated; and in prorating the operating expenses of the east and west Jennings

gathering systems, it has allocated 52.9% thereof to Laredo, (R. II, 805), although it is undisputedly shown that in 1933 when the Company began trying to use Pescadito-Jennings Line again, only 1.53% of the volume of gas from the Jennings field was actually sent to Laredo, (R. I, 558).

XXVI-B, 3

(See p. 36, supra)

There was disagreement between the parties about the basis of apportionment of transmission system operating and maintenance expenses within the Laredo area. The Company prorated them upon a weighted basis of the two factors, lineal mileage of pipe and miles of 3" equivalent pipe, which had the effect of loading Laredo operating costs with three or four times as much expense as under the method used by the Commission's accountant, Lewis, who apportioned them upon the basis of MCF volumes of deliveries. The Company's method resulted in loading Laredo with costs which were properly chargeable to the Jennings-Roma line. Mr. Lewis' reasons for apportioning upon the basis of volumes in MCF are very plainly stated at R. II, 767-777, 793-794, 797-801, 806-811, 817-836, 821, (utilizing five-year experience); 888-889, 1297-1298, 1308-1314, 1321-1324, 1325-1326).

XXVI-B, 4

(See p. 36, supra)

Pipe Line Rentals: Here was another bald faced build-up by which the Company padded its operating

expenses loaded onto Laredo. When the Jennings-Roma line was completed in December, 1929, the Company constructed a tie-in line between Jennings Junction and Jim Hogg field, which line is shown in checkered colors on the map at R. II, 1405, or appendix, this brief.

The purpose of this line was to augment the supply destined for Monterrey, Mexico, (R. II, 1335-1336), from the Cole-Bruni fields and the Jim Hogg field, (R. II, 1222).

Although no gas coming through this tie-in line has ever been served in Laredo, and so far as the record reflects, never will be, the Company, at the end of 1929 began charging large amounts of purported "pipe line rentals" to the Laredo operations, (Lewis, R. II, 873). The Company attempted to show that some of the gas coming through this line was transported from Cole-Bruni field through the rented line to Jennings Junction, thence through the Jennings-Pescadito line to the main line into Laredo. It developed, however, that at the time the Company claimed this was being done, there was not even any physical connection between the rental line and the Jennings-Pescadito line.

When this rate controversy had its inception just prior to February, 1931, the city's engineer, Neff, called upon the Company for a map showing the transmission properties which it claimed were used and useful in serving Laredo. In response to that request, the company furnished to the City its map, (R. I, 216-a), and all of the maps appearing at R. II, 1397-

1403. None of these maps shows any physical connection or tie-ins between the rental line and the Jennings-Pescadito line, and Neff testified from actual physical inspection made by him that there was no such physical connection, (R. II, 1280-1283). After the Company's build-up for this rate case, it evolved the elaborate map appearing at R. II, 1405, December 31st, 1931.

When the Company was asked by the City's accountant, Lewis, for information as to the location of the line on which these purported rentals were supposed to be charged, the Company was unable to give the information, (R. II, 1314-1315). Counsel for the Company, in questioning Mr. Lewis about the interview, asked:

"Q. Didn't you get the impression that we did not know?

A. I do not believe you did know.

Q. I don't believe so either." (R. II, 1314).

At some time between the date of the map of February 28, 1931, (R. I, 216-a) and of the second map of December 31st, 1931, (R. II, 1405), a physical connection was made between the two lines at Jennings Junction, denoted by a black square. This connection, however, is used only for transporting gas southward out of the Jennings field into the Jennings-Roma line, and the Company's expert, Greene, himself, did not know when the physical connection was made, (R. II, 1217).

XXVI-B, 5

(See p. 36, supra)

Management Fees: The top holding company all along has been charging large management fees to the operating companies, (R. II, 1390). At one time the contract provided that these management fees should be based upon a percentage of the gross revenues of the operating company; and the percentage was bracketed so that the greater the gross revenues, (not net revenues) of the operating company, the greater would be the percentage to be paid as management fees, (R. II, 1328). The Company offered no evidence whatever supporting its claim for these management fees before the Commission. The Commission disallowed them, (R. I, 24).

In the District Court trial Dickerson, Vice President and Director of Electric Bond & Share Company, and sponsor for the Texas area, outlined in general terms the services for which these management fees were claimed to be paid, (R. I, 191-195). Neither Dickerson nor any other witness undertook to give any detailed or supporting data showing the cost to the holding company of these claimed services, (R. I, 686-695). Dickerson only stated his general unsupported conclusion that the services cost Electric Bond & Share Company "substantially 85% of the amount due," (R. I, 195).

It is to be remembered that the record showed the closest-knit inter-company affiliation and control among all of the interested companies, (R. I, 191-195, 230, 553-554, 559, 602-606, 645-646, 659-661, 686-695; R. II, 873-874, 1079-1080, 1334-1335).

Dickerson testified that his own salary, (R. I, 700-701) had been $22,000, later reduced to $20,000, per year, plus expenses. He testified also that Groesbeck, President of Electric Bond & Share Company, got a salary of $77,000 per year and that other officials got salaries from $100,000 down to $65,000 per year, his information being gleaned from newspaper reports, (R. I, 688-689). He was asked to produce a list of salaries paid to officials and principal employees of the company, and promised to do so. Instead of complying with the promise, however, he returned to New York and several days later, Hargrove, Vice President in charge of production and transmission for United Gas and affiliated companies, (R. I, 359), was sent to the stand to substitute for Dickerson. Hargrove testified that they had not obtained the salary list, (R. II, 1059).

Under the holdings of this Court in the *Dayton Case* and in *Smith v. Illinois Bell Telephone Company*, 282 U. S. 133, 152-157, 75 L. Ed. 255, 265-268, and other cases cited in footnote 29, infra, p. 104, the Company failed to discharge the burden of showing the actual cost of these inter-company services to the affiliated holding company, and, therefore, no part of same are properly chargeable as operating expenses.

XXVI-B, 6

(See p. 36, supra)

Uncollectible Bills: The Company charged into operating expense a sizeable reserve for uncollectible bills ("loss on bad debts"), R. II, 1390, "questionable items."

The Company follows the custom of obtaining meter deposits of a minimum amount of $5.00 per meter for domestic consumers, and larger amounts for users of greater volumes; attempting, as its witness testified, to base these required deposits on the estimated bill for sixty days, (R. I, 607-608, R. II, 1330-1332).

Under the statutes of Texas,[27] the Company is authorized to require such deposits from all customers, as a condition precedent to service, as will protect it against loss from bad debts. *Central P. & L. Co. vs. Purvis*, 67 S. W. (2d) 1086, 1089. Furthermore, the record shows that for the 12 months ending July 31, 1932, it charged into this item the uncollectible bills accumulated as far back as 1929 and 1930, (R. II, 794-795). It also charged, for 1933, bad debts incurred on transmission line operations outside Laredo, which could not have been incurred in Laredo, (R. II, 792). And, inasmuch as the Commission had allowed "reasonable compensation" for bad debts, (R. I, 24) even Lewis included $1,940.75 for bad debts for the year 1933, (R. II, 792); and, to this extent operating expenses for 1933 are over-liberal even in Lewis' Exhibit 8 (R. I, 253); and, of course, this, as well as the items of improper operating expense

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[27]Article 1440, R. C. S. Texas (1925): "Deposits for installing service. Every . . . corporation . . . engaged in the furnishing of . . . gas . . . which requires the payment on the part of the user of such service of a deposit of money as a condition precedent to furnishing the same, shall pay six per cent interest per annum on such deposit to the one making same . . ."

for 1932 and 1933, entered into the Company's computation at p. 34 of its Brief. This is the computation where the Company said, "Nothing can be said by way of argument that will add anything to what these figures show."

In view of these facts, and the fact that the Company could have protected itself against uncollectible bills by securing proper deposits, it is our position that these items, under the facts shown in this record, are not properly chargeable to operating expense.

XXVI-B, 7

(See p. 36, supra)

Donations: A public utility must confine its expenditures to such as are legitimate for carrying on its business. It may not, as between itself and the public, take the same liberties as a corporation may assume as between itself and its stockholders. Even between the Company and its stockholders, donations, though calculated to advance the interest of a corporation, are not permissible in a rate case. *Idaho P. Co. vs. Thompson*, 19 Fed. (2d) 547, 588; *McCrory vs. Chambers*, 48 Ill. App. 445; *Holt vs. Winfield Bank*, 25 Fed. 812; *Davis vs. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221.

XXVI-B, 8)

(See p. 36, supra)

General Office General Expense, Prorated: The task confronting the Commission's accountant, Lewis, in arriving at the correct operating figures for the periods

considered by the Commission, (R. II, 1381-1393), and particularly the account designated by the Company as "General Office and General Expense Prorated," (R. II, 1124, 1390, R. I, 256), will be realized when the Company's exhibit of "Classification of Accounts", appearing at R. II, 1137-1201, is referred to.

It will be noted that Lewis, in his endeavor to ferret out the actual expense items incurred by the Company and charged to its account No. 113-38-2, "General Expense Account," met with a continuous series of insurmountable obstacles.

Although the top or starting figure of this account was requested by Lewis of Womack earlier during the District Court trial, (R. I, 567), ten days later this information had not been furnished, (R. II, 812), and it was never furnished during the entire proceeding.

The top figure which Lewis requested of Womack was the "starting figure of general expense charged on the office books, account 113-38-2," and Womack's adjustments to that total, and his allocations, from the top company at the apex of the pyramid down through the underlying companies, based upon such starting figure, (R. II, 812). A reference to the Company's exhibit of classification of accounts (R. II, 1196) will readily disclose the necessity of having the starting figure of said account in order to enable an accountant to determine the propriety of charges and credits thereto.

The further difficulties encountered by Lewis are illustrated by the fact that in his endeavors to properly

classify the several accounts in the Company's operating statements, he found that such accounts had been reclassified as often as four or five times a year (R. II, 1307); and that there was no uniformity in the method pursued in the Accounting Department, although the Company professed to follow the standard classification of accounts as prescribed by the American Gas Association and the Association of Railway and Utility Commissioners, (R. I, 67-68). He found that the practice would be, that during certain months the amount paid an employee would be charged to "customers expense", and the following month it would be charged to "merchandising and jobbing account", and that as a result it was extremely difficult for him to determine "just what their policy was", as they had made "so many changes in that connection," (R. II, 1323).

Not having received the information requested, as above shown, Lewis had no other alternative than to use, in his Exhibit 8, (R. I, 253-259, R. II, 1115-1127) the Company's own allocations of these items of General Office General Expense. He testified repeatedly that he was not satisfied with such allocations as being correct, but there was nothing he could do about it. (R. II, 793-794).[28]

Next to "Gas Purchases," this was the largest single item of operating expense in the years covered by the

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[28]Lewis' testimony, with reference to allocations of general expense items, and the necessity of his using the Company's percentages (R. II, 793-794) was deleted by the Company when it designated for printing its clipped excerpts, R. I, 271.

exhibits up through 1931, and for 1932 and 1933 it was the *largest* item. (R. I, 253, R. II, 1115).

This, therefore, is another substantial item of error entering into all of the Company's computations, particularly those appearing at pp. 34, 36, and 37 of its Brief.

These charges, reflecting allocations of expense between a multiplicity of affiliated companies in inter-company transactions, do not stand upon the same footing, and do not carry the same presumptions of regularity, necessity and reasonableness, as do items of expense incurred and paid directly (in fixed and unallocated amounts) to outside, disinterested parties; and the character of proof required to support such inter-company charges is therefore essentially different from, and more strict than, those so incurred and paid. The Company, however, proceeds on the assumption that all items actually appearing on its books, regardless of their origin or nature, are properly chargeable as operating expense in the computation of the rate structure, and are *prima facie* proof of their own propriety and reasonableness. This Court has never sanctioned such theory.[29]

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[29]Chicago & G. T. R. Co. vs. Wellman, 143 U. S. 339, 346, 36 L. Ed. 176, 180; Smith v. Illinois Bell Tel. Co., 282 U. S. 133, 152-157, 75 L. Ed. 255, 265-268; Acker vs. United States, 12 Fed. Suppl. 776, 779, affd. 298 U. S. 426, 80 L. Ed. 1257; Dayton P. & L. Co. vs. Pub. Ut. Com. of Ohio, 292 U. S. 290, 295, 78 L. Ed. 1267, 1273; Western Dist. Co. vs. Pub. Serv. Comm., 285 U. S. 119, 126-127, 76 L. Ed. 655, 659; United Fuel Gas Co. vs. R. R. Com. of Ky., 278 U. S. 300, 320, 73 L. Ed. 390, 401.

The Commission's operating statements included charges for "New Business Expense", (R.I, 253; R. II, 1115). On this item, again Lewis' exhibits are over-liberal to the Company, in that the record does not support the inclusion of such item. *West Ohio Gas Co. vs. Public Utility Comm.*, (Lima Case), 294 U. S. 62, concurring opinion of Mr. Justice Stone, pp. 77-78, 79 L. Ed. 761, 772-773.

XXVI-B, 9

(See p. 36, supra)

Wellhead Price of Gas Purchases: Before the Commission, the parties stipulated (R. I, 66) that 5c per MCF should be accepted as the price for gas at the wellhead, and on this basis no production properties were evaluated.

In the trial before the District Court, however, it developed that the Company was paying as little as 3c per MCF in the Martinez (Fansler) Field, a few miles south of Jennings Junction. All of this gas, however, was transported to Mexico, (R. I, 650). Womack, Company's accountant (R. I, 579), and Hargrove, Vice-President, in charge of production and transmission (R. I, 359), showed (R. II, 1103-1104) that the Company was purchasing extensively at 4c per MCF in the Laredo area. Mayor Martin also testified (R. II, 946) to a prevailing wellhead price of 4 cents in the Carolina-Texas area. Other testimony showed (R. II, 1101) an average prevailing price of 4.25c or 4.30c per MCF at the wells. Commission's accountant, Lewis, before the court, used a composite figure of 4.257c, (R. II, 802).

We have already pointed out that the Company, both before the Commission and court, attempted to load this price with the additional 1c per MCF gathering charge in favor of its affiliate Southern Gas Company in the Carolina-Texas field from whence the Laredo gas was being taken.

Before the District Court, the Company also attempted to load the actual wellhead price by adding thereto additional expense for geological and exploratory activities, R. I, 101-102, 360-361, 363; R. II, 1101-1102). Company witnesses were unable to give any supporting data to justify the addition of this item of expense, and were unable to say that any such expense had been incurred in connection with any of the leases from which the Company bought gas for Laredo, (R. I, 580-582).

Before the Commission, Lewis used the 5c wellhead price according to the stipulation, (R. I, 261); but in view of the Company's attempts to add to the actual wellhead price he used, in the Court, the actual cost at the well (R. II, 755-756, 843). See also Stein, R. I, 615-616; Womack, R. I, 554-556, 559, 560, 591-593, 599; Lewis, R. I, 261-262.

(See pp. 36-37, supra)

Lewis prepared a chart disclosing the gas sales and operating expenses of the Company over a period of years through 1932, (R. II, 1380-A). From this chart it will be seen that subsequent to the Company's peak year of 1930, during which period its gas sales declined steadily, transmission and distribution main-

tenance and operating expense declined proportionately; on the other hand, "General Expense" began a steady increase throughout the period; in fact, while production expense decreased 20.75%, transmission expense 19.32%, distribution expense 34.40%, utilization expense 76.68%, customer expense 12.04%, and even new business expense decreased 10.49%—General Expense *increased* 31.32%. (R. II, 763). In these circumstances such increased general expense should not be given any force in a case of claimed confiscation: *Reno P. L. & W. Co. vs. Comm.*, 298 Fed. 790, 801.

OPERATING EXPENSES IN GENERAL

Even Lewis' Exhibit L before the Commission, (R. II, 1381-1393), and his Exhibit 8 before the District Court, (R. I, 253-259, R. II, 1115-1127), include all of the above-mentioned improper or questionable items of operating expense, with the exception of pipe line rentals and 1c gathering charge in Carolina-Texas field, which he eliminated in his said exhibits.

In Exhibit L (R. II, 1390) before the Commission, although he included such questioned items (except gathering charge and pipe line rentals) in his operating statements, he set them apart as "questionable items," so that the Commission might handle them as it thought fit. Since the City and Commission had no accounting statement before the District Court for the entire calendar year 1932, (but had only that previously made before the Commission, up to July 31, 1932), the Commission has neither eliminated nor segregated in its exhibits before the District Court

the questionable items for the five-months' period, August 1-December 31, 1932.

In Lewis' exhibit before the District Court, he has, for the year 1933, eliminated, as above stated, the pipe line rentals and 1c gathering charge, and a portion of "General Office General Expense Prorated" for which he had sufficient data to justify elimination. As to the remaining "General Office General Expense Prorated," he was, as above stated, not at all satisfied, but had not sufficient data to justify elimination and hence had no alternative but to include it. Thus, if our position be correct as to any or all of these improper or questionable items of operating expense, even the operating statements prepared by Lewis, (R. II, 1381; R. I, 253), reflect to that extent too low net operating results.

XXVI-D, 5

(See p. 39, supra)

When the Commission hearings were held, in October and November, 1932, (R. I, 11), the record shows plainly that the Company had full knowledge that the so-called "non-recurring revenues" from industrial sales previously made to Central Power & Light Company and the Company's affiliate (R. I, 110) Motor Fuel Products Company had already long ago failed.

Motor Fuel Products Company's plant was shut down in the early part of 1931, (R. I, 110), and from that date forward the Company knew the sales to it were out of the picture. As to Central Power & Light Company, the record shows that the Company knew also "at the beginning of 1931" (R. I, 106) the sales

to it had begun to "show a decline in comparison to the amount . . . in the preceding years."

Company's witness Randall, who was in charge of its industrial sales at Laredo, knew, prior to the Commission's hearings, of the Central Power & Light Company's original plan to build a new plant in Laredo; and he knew also of its change of plan later to abandon regular generation of electricity at its Laredo plant and to build an inter-connected system to bring into Laredo electricity generated at its plants elsewhere—for he was negotiating with them for a continuation of their use of gas in the Laredo plant all the while, and knew the Company's refusal to lower its industrial price, and its arbitrary raise of the second bracket of industrial sales from 16c to 18c per MCF on January 1, 1929, was largely an instrumental factor in the electric utility's decision to generate its electricity elsewhere, (R. I, 548, 544-552). Local Manager Stein also knew of these circumstances, (R. I, 609-611).

The new inter-connected electric transmission line was completed and connected in 1931, (R. I, 106) and the Company knew from that time forward its big sales to Central Power & Light Company were at an end. Yet the Company, in the hearings before the Commission did not by oral testimony, exhibits or otherwise give the Commission the benefit of that information, or in any way put the Commission upon notice that the previous sales to these two customers had declined or failed or would not be enjoyed in the future.

For the first time in District Court, the Company plead (R. I, 37-38) that these sales would be "non-recurring"—attempting in the pleading, incidentally, to make it appear that the Company had not known of this "non-recurrence" until *after* July 31, 1932, which was the final accounting period presented before the Commission—and there, for the first time by its oral testimony and exhibits brought out the "non-recurrence" of these revenues.

In *Western Dist. Co. vs. Pub. Serv. Com. of Kans.*, and other cases, all cited at p. 40, supra, it has been held, by the lower courts and by this Court, that it is improper for a utility to withhold from the regulatory body material evidence of which it is aware, bearing upon the question of rates, and then for the first time adduce such evidence in the courts in support of an application for injunction against enforcement of the regulatory orders.

The rule of estoppel should be applied with especial strictness in a flagrant case of the kind here presented—for the inevitable result would be that a utility could and would defeat all attemps at regulation by the simple expedient of allowing the regulatory body to fall into error for lack of evidence and then set aside its order in court upon evidence never produced before the Commission.

CONCLUSION

In *Lindheimer vs. Ill. Bell Tel. Co.*, 290 U. S. 151, 175, 78 L. Ed. 1182, 1197, this Court said:

> "It is not the function of the court to attempt to construct out of this voluminous record inde-

pendent calculations to invalidate the challenged rates. It is enough that the rates have been established by competent authority and that their invalidity has not been satisfactorily proved."

Likewise, we find it instinct in all the decided cases that no burden rests upon the Commission to attempt to make computations which will uphold the rate, but that the burden rests upon the Company to prove confiscation by evidence so clear and convincing as to leave no doubt in the minds of this Court.

As we conceive it, our duty is fully discharged when we point out, as we have attempted to do, the principal fallacies in the Company's evidence and show that these have produced error in the results arrived at in the Company's computations. We do not understand that it is our duty—nor, under this record, would it be possible—to measure exactly in dollars the extent of the errors injected by the Company into its computations and estimates. See footnote 24, p. 91, supra.

If this Court is of the mind to attempt to construct its own computations out of this record, and make due allowance for all of the patent errors in the Company's methods of approach, we certainly shall not object to its so doing; for we are confident that if the necessary adjustments and allowances be made, it will be seen that the Commission has been overliberal in its allowances in every element, ultimate and subsidiary, entering into the computation of the rate structure; and that if a corrected average be computed over a reasonable spread of years—any years the Court may choose out of those reflected by the operating statements in evidence—it will be seen that the 55c rate

will, on the average over 1932 and 1933 and for the future, earn a rate of return very substantially above the line of confiscation.

Even the Company, at p. 23 of its Brief, has abandoned Paragraph 4 of its Assignment of Errors (R. I, 511), in which it was originally urged that the 3% per annum allowed by the Commission for future depreciation reserve accruals was too low.

At p. 68 of its Brief the Company states that it applied to the City for an increase in its rates *prior* to January 1, 1932, the effective date of the order. This is directly contrary to, and is in the teeth of the indisputable fact, shown by the record, (R. I, 10; R. II, 1351-1352-A, 1353-1355), that it did not ask for the increase until *June* 27, 1932—nearly six months after the effective date of the ordinance, and more than seventeen months after it was alleged (R. I, 40) the 75c rate had become confiscatory in "*February*, 1931."

At pp. 61-62 of its Brief, the Company says that the Commission did not submit any operating statement for the calendar year 1932, and (Brief, pp. 37, 34) that its own operating statement for that calendar year stands "undisputed." The Court knows that it is utterly foolish to say the computations for 1932 are "undisputed", but we wish to point out why the Commission made no operating statement for the calendar year 1932: The parties agreed upon the final accounting period before the Commission to be the twelve months ending July 31, 1932, that being agreed as the latest date the accounting records could be brought down before the hearing. Before the court,

the Commission had been able to complete its audit of the Company's records for the calendar year 1933 only, (R. I, 287, 233).

At p. 15 of its Brief, the Company mentions Federal Income Taxes. The only evidence as to income tax in the entire record appears at R. II, 886, where Lewis, on being questioned whether the Company paid any income tax for 1932 or 1933, stated that he had not seen the Company's consolidated tax return, but that the earnings of the South Texas Gas Company, particularly, would indicate that it was never subject to any income tax. The reason for this fact is not shown in the record. It may have been due to a number of factors not pertinent to earnings or to the rate structure—such as the filing of consolidated returns with its affiliated and parent companies, interest paid on borrowings, credits at 5% per annum taken for depreciation in income tax returns, etc.

The principal features of the picture the Company has attempted to paint for the courts are these: A claimed fair value rate base of $1,225,000.00; a required net annual return of 10% of that base; plus claimed future annual requirements for depreciation of 5%, 6% and 10%; annual operating expenses of $125,001.40 for 1932 and $119,821.04 for 1933; and net revenues for the entire future stripped down to the level of the depression year 1932 and the abnormally warm depression year 1933; each year standing upon its own bottom, independently of all calculations over a spread of years; so that in order to earn a return of 4.57% of its claimed fair value rate base (R. II, 1352) it claims it must charge $1.50 per MCF for

gas—which means that it would have to charge approximately $3.30 per MCF in order to earn the 10% net return it claimed to be necessary. In addition, it claims it is and will be perpetually haunted by the spectre of exhausted reserves.

But into the picture the Company has permitted many flaws and imperfections to appear, only the most serious of which we have attempted to point out in this Brief.

Over against its claim that it cannot obtain a market for sufficient volumes of gas in and about Laredo to enable it to sell at a cheaper price, is its inconsistent claim that it is always harried and hard put to obtain sufficient reserves to supply Laredo.

And against this claimed shortage of gas is the fact, to which one cannot close his eyes, that it has followed the not unknown practice of holding up through monopoly the domestic price to the highest point the traffic will bear, and "dumping" the surplus into Mexico and elsewhere for anything that can be obtained for it. And also, the strange paradox that the City of Laredo is sitting virtually on top of inexhaustible reserves of gas, in an area whence numerous large high-pressure lines are transporting gas away in enormous quantities to many distant points, and yet having to pay more for gas taken from the ground at its very front gate than is paid for the same gas after being transported long distances; such as Monterrey, Mexico; Houston, San Antonio, Austin, San Marcos, New Braunfels, and numerous Rio Grande Valley points.

It has not tried out the reduced rate, but on the contrary has defied the public rate-making authorities and chosen to "go into court" upon the ground of confiscation.

This Court, in upholding a rate, has used some very apposite language in *Knoxville vs. Knoxville Water Co.*, 212 U. S. 1, 17, 18; 53 L. Ed. 371, 381-382, as follows:

> P. 16: "The jurisdiction which is invoked here ought, as has been said, to be exercised only in the clearest cases. If a company of this kind chooses to decline to observe an ordinance of this nature, and prefers rather to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would necessarily be so confiscatory in its effect as to violate the Constitution of the United States . . .
>
> Pp. 17-18: "Where the case rests, as it does here, not upon observation of the actual operation under the ordinance, but upon speculations as to its effect, based upon the operations of a prior fiscal year, we will not guess whether the substantial return certain to be earned would lack something of the return which would save the effect of the ordinance from confiscation. It is enough that the whole case leaves us in grave doubt. The valuation of the property was an estimate and is greatly disputed. The expense account was not agreed upon. The ordinance had not actually been put into operation; the inferences were based upon the operations of the preceding year; and the conclusion of the court below rested upon that most unsatisfactory evidence, the testimony of expert witnesses employed by the parties."

This litigation has been a protracted and an expensive one, and should be terminated. We respectfully submit that the judgment of the Court of Civil Appeals and of the Supreme Court of Texas should be affirmed.

Respectfully submitted,

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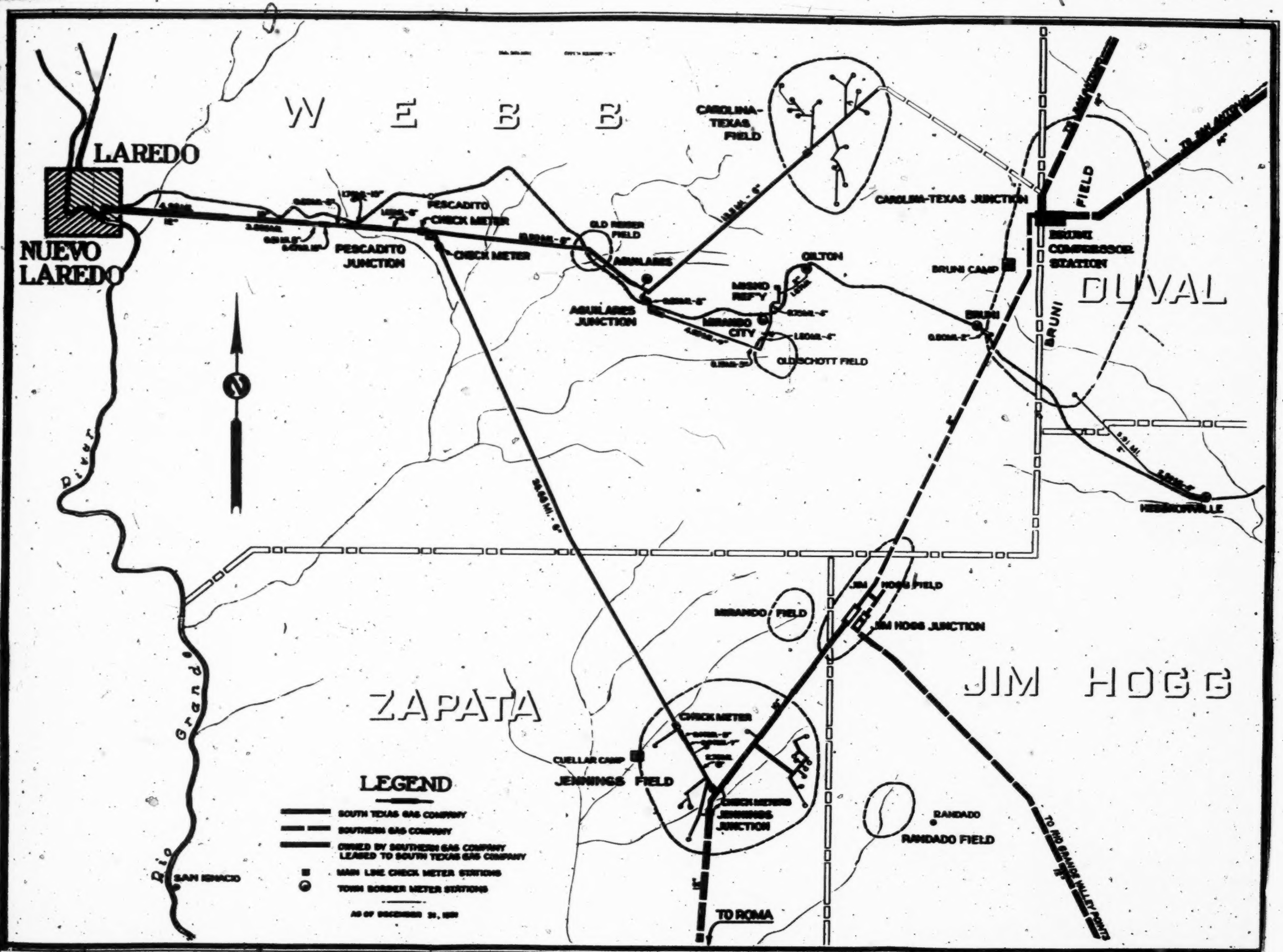
WEBB
LAREDO
NUEVO LAREDO
Rio Grande River
SAN IGNACIO
PESCADITO JUNCTION
PESCADITO CHECK METER
CHECK METER
OLD RIDER FIELD
AGUILARES
AGUILARES JUNCTION
CAROLINA-TEXAS FIELD
CAROLINA-TEXAS JUNCTION
MIRANDO REF'Y
MIRANDO CITY
GILTON
OLD SCHOTT FIELD
BRUNI CAMP
BRUNI
BRUNI COMPRESSOR STATION
BRUNI FIELD
DUVAL
HEBBRONVILLE
ZAPATA
JIM HOGG
MIRANDO FIELD
JIM HOGG JUNCTION
CUELLAR CAMP
JENNINGS FIELD
CHECK METER
JENNINGS JUNCTION
RANCHITO
RANCHITO FIELD
TO RIO GRANDE VALLEY POINTS
TO ROMA
LEGEND
SOUTH TEXAS GAS COMPANY
SOUTHERN GAS COMPANY
OWNED BY SOUTHERN GAS COMPANY LEASED TO SOUTH TEXAS GAS COMPANY
MAIN LINE CHECK METER STATIONS
TOWN BORDER METER STATIONS
AS OF DECEMBER 31, 1951